264 - 28540

HARRY S. HAZE, (Plaintiff), Appellee, vs. MONROE, LEON AND TEES, a corporation, (Defendant), A. FRANCK PHILIPSON, (Garnishee), Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the garnishee from a judgment in the sum of $200, entered upon the finding of the court, motions for a new trial and in arrest of judgment having been overruled.

The suit was begun by plaintiff Haze against Monroe, Leon and Tees, a corporation, by attachment. The affidavit therefor alleged, with other grounds, that the corporation was not a resident of this State and that its place of residence was in the State of Delaware. The attachment was sustained and judgment entered against the defendant corporation by default in favor of plaintiff for the sum of $829.23. The garnishee answered that he had no funds or property of any kind in his possession belonging to the debtor, and by an amended answer set up that the debtor, Monroe, Leon and Tees, was never qualified to transact business in Illinois and, therefore, could not sue in the courts of this State, and moved the dismissal of the case for that reason.

The garnishee argues here that as the attachment was sustained upon the ground alone that the defendant debtor, although a foreign corporation, had not procured a license to do business in this State, the court erred in refusing to dismiss the case, and further erred in that it refused to receive evidence tending to sustain this defense. No direct evidence tending to sustain that point was offered in behalf of garnishee, but upon cross-examination

a witness was asked whether or not the corporation was authorized by the Secretary of State to transact business in Illinois, and an objection was sustained, rightly, we think, for the reason that it was not proper cross-examination. Moreover, even if it were established that the defendant was a foreign corporation not authorized by the Secretary of State to transact business in Illinois, this would not have been necessarily a defense to the suit. It was necessary in order to establish that defense that the defendant garnishee should further allege and prove that the corporation was not engaged in interstate commerce, (see Bamberger-Stern Co. v. Anderson, 207 Ill. App., 222) and also that it was unlawfully doing business within the meaning of the statute, and a single transaction does not constitute doing business within that meaning. Plew v. Board, 274 Ill., 232.

The controlling question in the case, however, is whether there was an enforceable debt due from the garnishee to the corporation for which it might have recovered in an action in assumpsit, and the decision of this question makes necessary a consideration of the evidence offered bearing on that point. It appears that Monroe, Leon and Tess was a corporation engaged in the brokerage and promotion business. The garnishee, Philipson, was the owner of a patent for a coal tar disinfectant called "Tarx." About May 1, 1920, the garnishee, Philipson, made an oral agreement with the corporation for the sale of this patent. On July 20th thereafter this oral agreement was confirmed by a letter from Philipson to the corporation, wherein the agreement was stated as follows:

> "1 - You to sell said patents for a sum of $10,000.00 (Ten Thousand Dollars) cash and one-third interest (or its equivalent) in a stock corporation, which is to be the owner of said patents.
>
> 2 - I to pay you 10% commission on all monies received in cash and also 10% of all dividends derived from said one-third interest (or its equivalent) in said stock company.
>
> 3 - Your 10% commission to be paid to you not later than 14 days after said cash payment is fully paid to me, and not

later than 14 days after each time I receive dividend from my holdings in said company. If a royalty is paid me as an equivalent for part of the stock in said company, then you are to receive 10% of said royalty not later than 14 days after each payment.

4 - This agreement shall extend to my heirs and assigns."

As a matter of fact, the plaintiff and the garnishee had entered into an agreement on the 30th day of June, 1920, whereby Philipson as party of the first part, and Haze as party of the second part, agreed that the party of the first part would assign these letters patent for the sum of $10,000 in cash, payable $1,000 at the execution thereof and the remainder in installments. As a further consideration the party of the second part agreed that he would immediately organize or cause to be organized a corporation with a capital stock of $250,000, and as part consideration for the assignment have issued to the party of the first part 25% of the capital stock. This agreement, which was under seal, further provided that in the event the second party should find it impracticable or impossible to fulfill the obligations of the agreement so far as incorporating and acquiring working capital was concerned, he might at any time re-assign the patents to the first party, (he in such event to forfeit all payments theretofore made or which might have become due prior to such re-assignment) but by such re-assignment should incur no further liability with respect to the payments accruing subsequent to the re-assignment. The uncontradicted evidence shows that a total of $2000 was paid upon said contract, and that thereafter Haze defaulted in making these payments and that under the terms of the contract Philipson retained the $2000 and cancelled the contract because of the non-payment of the balance of the purchase price.

The trial court was of the opinion that under the terms of the agreement Philipson was indebted to the corporation in the

amount of 10% of this $2000, while the defendant garnishee contends that under clause 3 of the statement of July 20, 1920, the commission was to be paid not later than 14 days after the cash payment was fully paid to Philipson, and only in that event, and as it was never fully paid no liability arose. The garnishee in his argument refers us to certain elementary rules which obtain in the construction of contracts, namely, that the contract must be construed as a whole and the intention of the parties gathered from the entire instrument rather than from detached portions of it, and that for the purpose of ascertaining the intention of the parties, the position in which they find themselves placed and the circumstances surrounding the execution of the contract should be considered. These propositions of law are not disputed. The garnishee in construing the agreement of July 20th says that paragraph No. 1 deals with the subject matter and price, No. 2 with the compensation to be paid, No. 3 states how and when the compensation shall be paid, and No. 4 extends the contract to the heirs and assigns. He, therefore, in the construction of No. 2, excludes from its subject matter any question as to the time when compensation should be paid. We do not agree with this construction. No. 2 states specifically that a 10% commission is to be paid "on all monies received in cash." No. 3 states that the 10% commission must be paid "not later than 14 days after the cash payment is fully paid." It seems to us reasonable to hold that the clause quoted from No. 2 refers to the compensation to be paid in case the purchaser paid less than the full amount, while No. 3 refers to the time of payment in case the contract should be completed. By this construction effect is given to both these clauses, and it is unnecessary to hold that there is any surplusage in either paragraph.

The garnishee argues that the parties themselves had given a different construction by their conduct because of the fact that it does not appear that the corporation for more than a year

made any claim that compensation was due to it under the circumstances. However, the statute of limitations had not run, and we think the bare fact that the claim was not presented could not be held to amount to such a construction.

The garnishee further contends that the corporation, as broker, was not the procuring cause of the sale. We think the evidence shows otherwise.

It is also argued that the corporation as a broker was not entitled to commission because, it is said, the sale amounted to a purchase by itself directly or indirectly. This position cannot, we think, be sustained. The corporation was an entity separate and distinct from its officers and employees. Moreover, plaintiff, the evidence discloses, took the title only as a matter of convenience with a view to transferring it to the corporation which the parties interested would cause to be formed.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

made my claim that gerrymandering was and is in fact the alleg-
ation. However, the holding of elections had not yet, and we
hold it has been from that the state was not prevented until not be
made to answer to such a contravention.

The petitioner further asserts that the decision
is proper, for not yet erroneous under of the act. To CLAY the
evidence clear violation.

It is also argued that the contravention as a factor was
not material to constitute fraudulent, as it said, the act consisted in
a question by illegal drawing an indictment. This question cannot,
we think, be maintained. This contravention was in reality material
and derived from the intended act complained. Therefore, illegality,
the evidence discussed, such the state has a right as a matter of contravention
with a view to disqualifying it in the contravention which the certain
interpretation might cause in the future.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

Respectfully yours Johnson, Jr., Justice.

(346a)

294 - 28570

RUDOLPH LAMBRUTI, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
GEGENSEITIGER UNTER STUTZUNGS VEREIN VON CHICAGO, (Mutual Benefit and Aid Society), a corporation, Appellee.	232 I.A. C11

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals to this court from an order of the trial court which overruled its motion to vacate a judgment theretofore entered upon the verdict of a jury. The abstract states that the finding of the jury was ex parte and in the absence of defendant. It does not, however, contain any showing as to whether the absence was willful or otherwise. In fact no bill of exceptions was preserved in the case. It is argued that the affidavit of claim does not comply with the rules of the Municipal Court or section 55 of the Practice Act. This, however, is wholly immaterial as the judgment does not appear to have been rendered by default. A jury was called and the evidence submitted to it upon the issues as made up.

There is no bill of exceptions and no error appears in the common law record, and, therefore, although the plaintiff has not appeared in this court in behalf of the judgment, we are compelled to affirm it.

AFFIRMED.

McSurely and Johnston, JJ., concur.

SUPREME COURT.

Appellant,

vs.

CONSOLIDATED VENEER CORPORATION
DOUGLAS FOX JACKSON, DONALD
DOUGLAS FOX JACKSON, a
corporation,

Respondents.

APPEAL FROM

DISTRICT COURT

OF DOUGLAS.

2321 A. 2d 1

IN. PRESUMPTION AGAINST WAIVER

OF RIGHT TO TRIAL BY JURY.

The defendant appeals to this court from an order of the trial court upon overruling its motion to vacate a judgment theretofore entered upon the verdict of a jury. The chief error assigned is failure of the jury was an error and in the opinion of defendant. It does not, however, matter any nothing is to whether the director was willful or otherwise. In lack of the will of exception was preserved in the case. It is argued that the affidavit of claim does not comply with the rules of the municipal court or section 10 of the practice act. This, however, is merely immaterial - the judgment does not appear to have been rendered by default. A jury was called and the verdict was taken. It is upon the issues as made up.

There is no trial of conclusions and no error appears in the record for review, and, therefore, although the matter not appeared in this court on behalf of the judgment, we are compelled to affirm it.

AFFIRMED.

Kennedy and Johnson, JJ., concur.

5 - 27816

(346 Ill)

DR. S. R. BUTTS,
Plaintiff in Error,

vs.

MRS. GEORGE (GRACE) SMITH
and MR. GEORGE SMITH,
Defendants in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

232 I.A. 311

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal court of Chicago, brought by plaintiff in error to reverse an order of the Municipal court vacating a judgment in favor of plaintiff in error against Mrs. George Smith, defendant in error, and reinstating the cause for trial. The action in the Municipal court arose out of a claim on the part of plaintiff in error of a balance of $315 alleged to be due to him from defendants in error for dental services rendered to defendants in error. Service was had only on defendant in error Mrs. George Smith. On motion of defendant in error Mrs. George Smith the time for filing an affidavit of merits was extended fifteen days from December 10, 1920. No affidavit of merits was filed within that time. December 29, 1920, on motion of plaintiff in error, defendant in error Mrs. George Smith was defaulted for want of an affidavit of merits, damages in favor of plaintiff in error were found by the court in the sum of $315, and judgment was entered on the finding. Thereafter defendant in error Mrs. George Smith filed a petition under Section 21 of the Municipal Court Act to vacate the judgment and to reinstate the cause. Plaintiff in error moved the court to overrule the petition on the ground that it was insufficient in law. The court denied the motion of plaintiff in error. The parts of the petition which we think it necessary to consider are as follows:

[illegible]

[illegible]

[illegible]

"Your petitioner further represents that after the service of summons was had upon her, she employed counsel to enter her appearance and make demand for a trial by jury; that she left the city of Chicago on the 16th day of December, A. D. 1920, and went to Wellesten, Ohio, where she remained until the month of February, A. D. 1921, and that she was absent from the city of Chicago at the date of the rendition of said judgment, and did not become aware of the fact that judgment had been entered until January 9th, 1922, at which time she was informed by her attorneys of the rendition of said judgment. ****** Your petitioner further represents that she is informed and believes that plaintiff's itemized statement of account was not filed simultaneously with his statement of claim in this cause, and that by reason of the failure to file said itemized statement of claim your petitioner was informed by her counsel that she would be unable to file an affidavit of merits until she was in possession of the information contained in plaintiff's statement of account. Your petitioner further represents that there does not appear to have been an order entered in this cause permitting plaintiff to file his statement of claim, and your petitioner further represents that she had been informed that said cause had been continued to a date subsequent to the 11th day of January, 1921, and that an order had been entered by the court extending the time of filing her affidavit of merits until after said last mentioned date, and that said Default Order was entered as a result of the mistaken statement of facts to your petitioner, and therefore should in equity and good conscience be set aside and the said cause placed on the trial call of this court."

Section 21 of the Municipal Court Act provides in part as follows:

"If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within 30 days after the

"Your petitioner further represents that after the service of summons was had upon her, she employed counsel to enter her appearance and make demand for a trial by jury; that she left the city of Detroit on the 15th day of December, A. D. 1899, and went to Tallahassee, Ohio, where she remained until the month of February, A. D. 1900, and that she was absent from the city of Detroit on (by) line of the rendition of said judgment, and did not become aware of the fact that judgment had been entered until January 9th, 1902, at which time she was informed by her attorneys of the rendition of said judgment. Your petitioner further represents that she is informed and believes that plaintiff's itemized statement of account was not filed simultaneously with his statement of claim in this cause, and that by reason of the failure to file said itemized statement of claim your petitioner was informed by her counsel that she could be unable to file an affidavit of merits until she was in possession of the information contained in plaintiff's statement of account. Your petitioner further represents that there does not appear to have been an order entered in this cause permitting plaintiff to file his statement of claim, and your petitioner further represents that she had been informed that suit cause had been continued to a date subsequent to the 11th day of January, 1902, and that an order had been entered by the court extending the time of filing her affidavit of merits until after said last mentioned date, and that said default order was entered on a result of the misleading statements of fact to your petitioner, and therefore should be set aside and your petitioner be permitted to file her answer in the trial court of this cause."

Section 2 of the Statutory Court Act provides in part as follows:

"If no decree is rendered, but suits or notice of any judgment, order or decree shall be obtained within 30 days after the

entry of such judgment, order or decree, the same shall not be vacated, set aside or modified, excepting on appeal or writ of error, or by a bill in equity, or by a petition to said Municipal court, setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity: Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases, in the Circuit court."

In our opinion the petition of defendant in error Mrs. George Smith, is insufficient and should have been denied. It doesnot show any grounds for equitable relief, nor does it show any error of fact which, if known to the judge of the Municipal court who entered the judgment, would, as a matter of law, have precluded the entry of the judgment. Examples of errors of fact which would support a writ of error coram nobis are such as the death of the nominal defendant, infancy without a guardian, disability of coverture, and insanity at the time of the trial. Chapman v. North American Insurance Company, 292 Ill., 179, 185. The petition discloses no error of fact that is similar in principle to the ones enumerated.

For the reasons stated the order of the Municipal court is reversed.

REVERSED.

Matchett, P. J., and McSurely, J., concur.

entry of such judgment, order or decree, the same shall not be vacated, nor altered or modified, excepting on appeal or writ of error, or by a bill in equity, or by a petition to said Municipal court, setting forth grounds for vacating, setting aside or modifying the same, which shall be sufficient to cause the same to be vacated, set aside or modified by a bill in equity: Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases, in the circuit court."

In our opinion the petition of defendant in error was sworn with, is insufficient and should have been denied. It doesn't show by grounds for reviewable relief, nor does it show any error of fact which, if known to the judge of the Municipal court who entered the judgment, would, as a matter of law, have prevented the entry of the judgment. Examples of errors of fact which would support a writ of error coram nobis are such as the death of the material defendant, infancy without a guardian, disability of coverture, and insanity at the time of the trial. Chapman v. North American Accident Company, 292 Ill., 179, 126. The petition dismissed no error of fact that is material in principle to the case presented.

For the reasons stated the order of the municipal court is reversed.

Reversed.

Matchett, P. J., and McCurdy, J., concur.

178 - 28013

(3466)

WILLIAM F. CONROY et al.,
Appellants,

vs.

THOMAS B. CONROY et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

232 I.A. 611

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

In this case a bill of equity was filed by William H. Conroy and his wife, Mary Conroy, appellants, against William H. Conroy's brother, Thomas B. Conroy, and Thomas' wife, Catherine Conroy, appellees, alleging that appellees gave to appellants a house and lot as a wedding present; that afterwards appellees by fraudulent representations induced appellants to sign and execute a warranty deed conveying the property to appellees; that when appellants signed and executed the deed they did so without reading it and relied on false representations made by appellees that the signing and execution of the instrument was necessary to give appellants a clear and undisputed title to the property. The bill prays for the cancellation of the deed and the issuance of an injunction restraining appellees from conveying or encumbering the property and from ousting appellants from possession. The answer of appellees denies the allegations of the bill. The case was referred to a master, who found in favor of appellees and recommended that the bill be dismissed for want of equity. The trial court confirmed the master's report and dismissed the bill for want of equity.

The undisputed facts are substantially as follows: Appellant, William F. Conroy, was about to be married. He told his brother, appellee Thomas B. Conroy, of his intended marriage and Thomas made him a present of about $1300 or $1400 worth of furniture. Thomas also purchased a house and lot and had the deed made out to appellants William H. Conroy and his wife Mary.

WILLIAM V. DOWNEY et al.,
Appellants,

vs.

THOMAS H. DOWNEY et al.,
Appellees.

Appeal from Superior Court
of Cook County.

SYNOPSIS OF

Mr. JUSTICE BRADWELL DELIVERED THE OPINION OF THE COURT.

In this case a bill of equity was filed by William H. Downey and his wife, Mary Downey, complainants, against William H. Downey's brother, Thomas H. Downey, and Thomas' wife, Catherine Downey, defendants, alleging that complainants were in straitened a bond and lay as a working property; that defendants supplied by fraudulent representations (Thomas representing to him not having a mortgage that covering the property, he qualified; that when qualified (Thomas) had executed the bond they did on delivery demanded it and relied on false representations made by defendants that the signing and execution of the instruments was necessary to give defendants a clear and undisputed title to the property. The bill prays for the cancellation of the bond on the ground of the ignorance of an illiterate participating defendant from signing or misrepresentation the property and from depriving defendants from possession. The answer of appellees denied the allegations of the bill. The case was referred to a master, who found in favor of complaints and recommended that the bill be dismissed for want of equity. The trial court sustained the master's report and dismissed the bill for want of equity.

The undisputed fact is substantially as follows: Appellant, William V. Downey, was about to be married. He had his brother, appellee Thomas H. Downey, of his lodging house and Thomas made him a present of about $1000 or $1500 worth of furniture. Thomas also purchased a house and lot for the bride-to-be, in consideration William H. Downey and his wife Mary

The purchase price was $5300. There was a mortgage on the property amounting to $3000. Appellee Thomas B. Conroy paid $2300 in cash. The deed and abstract of the property were delivered to appellant William H. Conroy. Appellants took possession of the premises about the latter partof August, 1918, and have remained there ever since. On March 19, 1919, appellants executed a deed to appellees for the property. On the day the deed was executed appellant William H. Conroy had gone to the home of his brother, appellee Thomas B. Conroy. Appellant William H. Conroy and appellee Catherine Conroy, drove in the latter's automobile from the home of Thomas B. Conroy to the office of a man named Utesch, a notary and the real estate dealer who had negotiated the sale of the property to appellee, Thomas B. Conroy, picked up Utesch and then drove to the home of appellant William H. Conroy, where the latter and his wife executed the deed.

The only questions in the case are issues of fact. The two principal issues are, first, whether the property was given to appellants by appellees as a wedding gift; and, second, whether the conveyance to appellees by appellants was voluntary, or was made under the erroneous belief by appellants, induced by the alleged false representations of appellees, that it was necessary for appellants to sign the instrument to "clear the title" or to "save the property."

On the first question both appellants testified positively and repeatedly that appellees gave them the property as a wedding gift. Appellant, Mary Conroy, also testified that appellee Catherine Conroy gave her the "key to the back door" and said, "That is your home." The appellants are corroborated by the testimony of several witnesses, some of whom stated they heard appellee Thomas B. Conroy, and some that they heard appellee Catherine Conroy say that the property was a wedding gift. One of these corroborating witnesses named Kreft was the man from whom the property was purchased

for purchase price was [illegible]. There was a mortgage on the property amounting to $[illegible]. Jonathan Thomas S. Cooper paid $[illegible] in cash. The land and contract of the property were delivered to appellant William F. Cooper. Appellants had presented to the trustee about the latter's credit [illegible], 3010, and over [illegible] times over since, to March 12, 1970, consistently requested a loan to improve the property. On the day the last one requested appellant William F. Cooper had come to the home of his brother, appellee Thomas S. Cooper. Appellant William F. Cooper had previous dealings before, since in the latter's automobile from the home of Thomas S. Cooper to the office of a loan company [illegible], a foreign and had talked about the [illegible] the value of the property to appellant. Thomas S. Cooper, going to Detroit, had time only to the land of appellant William F. Cooper, where the latter and his wife showed the land.

The only question in the case was issues of fact. The two principal issues had, first, whether the property was given in consideration of a building site, or, secondly, whether the conveyance in question by contracting was voluntary, or was made under the erroneous belief by appellants, believed to be [illegible] false representations of appellee, that it was necessary, or expedient to do the transaction by "clear the title" or to "save the property."

In the first instance was appellants testified positively and repeatedly that Jonathan was from the property in a building site. Jonathan, Mary Cooper, also testified that appellee Thomas Cooper said "Pay in the back land" and said, "Take it your name." The appellants are corroborated in the testimony of several witnesses, some of whom stated that Jonathan said Thomas S. Cooper, and when that they [illegible] [illegible] money and that the property was a building site. But it [illegible]

by appellee Thomas B. Conroy. Kreft in his testimony stated several times that appellee Thomas B. Conroy said that he was going to make his brother a present of the property. Opposed to the testimony in behalf of appellants is the testimony of appellee Thomas B. Conroy and the testimony of the real est te dealer Utesch. The testimony of Utesch is of little weight. He stated that he "didn't understand it was a present;" and that appellee Thomas B. Conroy said he was "putting his brother in the place to give him a start." Appellee Thomas B. Conroy testified that he told appellant William H. Conroy that he would "make him a present of the furniture, but the house, no;" that if William ever sold the property he, Thomas, wanted his "equity out of it," and that William could have "whatever" he got "over it." Appellee Thomas B. Conroy further testified that William said he would pay him "very quick;" and that he, Thomas, said, "Pay me if you can get it, and it's satisfactory to me."

If the evidence on the question whether the property was a gift stood alone, we would be inclined to the conclusion that appellees had made a wedding present of the property to appellants. But when the further evidence relating to appellants conveyance of the property to appellees is considered, it seems clear that appellees never intended that the property should be an absolute gift.

The testimony of appellants in regard to the conveyance of the property by them to appellees is highly improbable. Appellant William H. Conroy testified that the day the conveyance to appellees was made by appellants he had taken the deed and abstract of the property to the home of appellees in order to get appellee Catherine Conroy to put them in "some vault" for "safe keeping;" that appellees have "a safe deposit box;" that the deed and abstract had been given to him about two weeks before by appellees; that at that time Catherine Conroy said: "Here, Bill, is

By supplies Thomas S. Dorsey. Doyle in his testimony stated several times that appellee Thomas S. Dorsey said that he was going to make his brother a present of the property. Upon is the testimony in behalf of appellants in the testimony of appellee Thomas S. Dorsey and the testimony of the real estate dealer Dawson. The testimony of Dawson is of little weight. He stated that the "plaintiff's understand it was a present;" but that appellee Thomas S. Dorsey said he was "putting his brother in the place of give him a chance." Appellee Thomas S. Dorsey testified that he told appellant William S. Dorsey that he "was like a tenant of the farmers, but the farmer, no;" that if William ever sold the property to Thomas, "equally out of it," and that William could have "whatever" he got from it." Appellee Thomas S. Dorsey further testified that William said he would pay the "very value;" and that he, Thomas, said, "Pay me if you can pay it, and this satisfactory to me."

If the evidence on the questions whether the property was a gift stand alone, we would be inclined to the conclusion that appellees has made a gratuitous present of the property to appellants. But when the further evidence relating to subsequent conveyance of the property is considered, it seems clear that appellees never believed that the conveyance amount to an absolute gift.

The testimony of appellants in regard to the conveyance of the property by them to appellee is highly important. Appellant William S. Dorsey testified that "the day the conveyance is appellee was made by appellants he had been the real owner, entirely of the property in the name of appellees in order to get appellee Dorsey to put them in home social; for "safe keeping;" that appellant said "a safe repository" that the land and defendant had been given to the model for worth dollars by appellant that of that also Dorsey, appellee, said, "Then, if I

the papers to your home - the deed and abstract of your home;" that he was taking the deed and abstract back to appellee Catherine Conroy because he "didn't want them to lay around the house;" that he had been keeping them in the "drawer in the house." He further testified that when he took the deed and abstract to appellees' home, appellee Thomas B. Conroy was not there; that when he gave the deed and abstract to appellee Catherine Conroy she said: "You know, Bill, you know you didn't have your name on these here final papers;" that he said nothing in reply; that thereupon he and Catherine Conroy went in appellee's automobile to the office of Utesch, picked up Utesch and drove to appellants' home and "walked right in;" and that the "first thing" Catherine Conroy said was: "Get your name on these final papers;" that she also said that she "came up there to get our names signed on there so that we would own our home;" that she said: "You know you never had your names on these papers, you and your wife, to own this here home, so you better put them on now;" that Catherine Conroy took "the paper" holding her right hand on it so that he could only see "about four blank lines;" that he signed the paper and that his wife signed it; that Utesch took it in the other room and stamped it and returned it to Catherine Conroy who put it in her pocketbook; that "Utesch never spoke one word from the time he hit the house until he left;" that after Utesch left, Catherine Conroy said to Mary Conroy: "Here is twenty dollars, go and buy yourself something, Mary, something that you need;" that during the entire time the word "deed" was never mentioned. Appellant William H. Conroy further testified that after the paper was signed and Catherine Conroy put it in her pocketbook, Catherine Conroy never said what she was going to do with it; that he did not ask her what she was going to do with it, and she did not say that she was going to put it with the other papers for "safe keeping."

Appellant Mary Conroy, wife of William H. Conroy, testified that the day William went to the home of appellants he told her he "was going up with the deeds to Conroys because he didn't like to have them around the house." She further testified that Catherine Conroy told her to sign her name to "the final papers;" that she just signed "the paper as a sister" and was "trusting" Catherine Conroy; that Catherine Conroy "had her hand" on the paper.

The testimony of appellants on the issue in question is far from convincing. Serious doubts arise on the face of the testimony as to its credibility. The silence of appellant William H. Conroy is difficult to understand. He asked for no explanations from appellee Catherine Conroy. He made no enquiry as to what was done with the paper that he signed. He did not know whether or not it was to be put with the other papers that he had given Catherine Conroy for "safe keeping." He and his wife repeatedly use the expression "final papers." Yet appellant William H. Conroy admits that Catherine Conroy had already given him the deed and abstract to the property and had said to him at that time: "Here is the deeds and the abstracts of your home." In view of this fact, how could appellants have imagined that other "papers" which they call "final papers" had to be signed before they could get a "clear title" to the property? Appellant William H. Conroy testified that appellee Catherine Conroy had told him many times that the "final papers" were necessary. Counsel for appellants state that William was uneducated, wholly inexperienced in business affairs, and relied entirely on appellants. This may be true, but he knew that he had the deed to the property; and as a matter of common knowledge he must at least have supposed that the deed was the "final paper." And when Catherine Conroy spoke of the necessity of signing the "final papers" it would have been the natural thing for him to have

asked her if the deed that she had already given him was not sufficient, and that if it was not sufficient, then to explain to him what she meant by the "final papers."

The testimony in behalf of appellees on the issue in question seems to be a more probable version of the affair. Appellee Thomas B. Conroy testified that the day William came to his house, he, Thomas, was sick; that William came to his bedroom, said he "was getting tired of it" and was "going to fetch the papers back," and that he "couldn't get along with his wife very well." The substance of the testimony that followed is that William wanted to return the property to his brother rather than to let it go to his wife and her family. Appellee Thomas B. Conroy further testified that William wanted to give back all of the furniture; that he, Thomas, said, "No, you can have that furniture;" that William said that all he wanted was the victrola; that he, Thomas, said: "Take the victrola; your wife will have the furniture if you don't want it; I wouldn't touch it." Thomas B. Conroy further testified that William left the deed and abstract on the bed and said: "Now, I am giving it back to you; I don't want it. I am leaving the city;" that he, Thomas, using a telephone at the head of his bed, telephoned his secretary to go to the bank and have a deed prepared. The deed conveyed the property to Thomas and was signed by appellants. Thomas testified that about six months after William and his wife signed the deed William came to see him and said to him that he wanted "to get that place back;" that he, Thomas, said: "You will never get it back. You can live there, however, and pay the taxes and the insurance which will run maybe $22 a month;" that he, Thomas, "could rent it for $40 to $45."

Appellee Catherine Conroy testified that on the day the deed was executed by appellants she was requested to go into the room of her husband, Thomas; that she assisted him when he telephoned;

that William was in the room and said he was "leaving the city" and that he wanted her to "sign the paper;" that she and William went in her automobile to the office of Utesch and then to William's home; that she and William went in Utesch's office together; that she said to Utesch: "Bill is leaving his wife, isn't it too bad;" that when she got to William's home she saw that his wife had been crying and was in a "terrible condition;" that when the deed was signed she, Catherine, did not touch it; that Utesch presented the deed to William and Mary for them to sign.

Utesch testified that he asked both William and Mary if they understood that they were "transferring the property back," and that they answered that they did; that he also asked them if they were doing it "of their own free will" and that they said that they were.

In considering the evidence relating to the conveyance to appellees it must be borne in mind that appellants allege that appellees fraudulently procured the conveyance. It is therefore incumbent on appellants to prove the fraud by clear and satisfactory evidence. McKennan v. Mickelberry, 242 Ill., 117, 134.

"If the motives and designs of the parties charged with fraud or collusion may be traced to an honest and legitimate source equally as to a corrupt one, the former explanation ought to be preferred." McKennan v. Mickelberry, supra. We are satisfied from the evidence that appellees are not guilty of fraud.

There is one significant, undisputed fact which appears in the evidence and which explains the reason why appellant William H. Conroy wanted to convey the property to appellees, and it is this: William and his wife were not living harmoniously together, and on the day of the conveyance William had decided to leave his wife. In the circumstances he did not want his wife to have any claim on the property, and to avoid such a contingency he decided to convey it to appellees. This is the reason, in our op-

that William was in the wrong and call for our "leaving the city" and use or secure her in "the country;" that the last William went in her companionship to the office of Dennis and used to William's house; that she and William went in company with the landlady; that she said to Dennis: "Will it cost much more, sir, if I let her go?" that when she got to William's house she did not ask for Mrs. Fox and William and was in a "terrible condition;" that when the door was opened she, Catherine, did not leave it; that Dennis overtook the head to William and stay for them in vain.

Taking cognizance that on cross-examination William and Mary if they contended that they were "interfering for property sake," was that they answered that they did; that in the city where the if they were late, it "is hard to see from city;" and that they held into that here.

In considering the evidence tending to the conspiracy to conclusion it must be borne in mind that constitutes alleged equitable fraudulently procured by misrepresentations. It is therefore incumbent on complainant to prove the fraud by clear and satisfactory evidence. Dolgeman v. Kirkpatrick, 98 Ill., 197, 198.

"If the motive and designs of the parties charged with fraud or collusion may be proved to be honest and legitimate courts equally as in a criminal case, the lower consideration ought to be preferred." Dolgeman v. Kirkpatrick, supra. We can maintain from the evidence that conclusions are not guilty of fraud.

There is the adjustment, unfortunately that which occurs in the relations and which constitute the motive for Catherine William E. Cooper wished to convey the property to complainant, and it is true: William and his wife were not living unfortunately together, but on the day of the conveyance William had deserted in their life view. In the documentary on his day was not with a home and divide on the property, but to avoid loss : complainant to realize to secure it to creditors. This is the fraudulent, in the con-

inion, why he was at the home of appellees on the day of the conveyance with the deed and abstract of the property, and it is also the reason why he went with Catherine Conroy and Utesch to his own home and together with his wife executed the deed to appellees. That the property was an absolute gift, and that the conveyance by appellants to appellees was obtained by fraud cannot be reasonably reconciled with the conduct of appellants as shown by their own testimony. If we assume their testimony to be true, we must indulge these highly improbable suppositions: that although they knew that they owned a piece of property on which $2300 had been paid, and knew that they had the deed and abstract of the property in their possession, yet they signed what they termed the "final papers," which they believed were to give a "clear title" to the property, without enquiring what was meant by "final papers," without asking why "final papers" were necessary, without obtaining possession of the "final papers" after they signed them, and without knowing what was done with the "final papers." Such conduct is opposed to customary conduct and cannot be satisfactorily explained or excused on the theory of a fiduciary relationship and inexperience in business.

We are of the opinion that the finding of the trial court is not clearly and manifestly against the weight of the evidence. Siegel v. Andrews, 181 Ill. 360; Cahill v. Lauf, 133 Ill. App. 607.

Counsel for appellants contend as follows: "All that the appellee, Thomas Conroy, ever claimed that was due him from his brother William, was the sum of $2300, the amount paid for the property over and above the mortgage thereon, so that at the very most that can ever be claimed for the deed of March, 1910, was that it was a mortgage for said $2300, and in no event should it have been construed as an absolute conveyance of all the right, title and interest of the appellants in and to the property in question."

We do not understand that the evidence shows that the claim of Thomas was that William owed him the sum of $2300, that he, Thomas, paid on the property as a cash payment. As we read the evidence, the contention of Thomas is not that William owed him anything in connection with the property, but that the property belonged to appellees and was not a gift to William; that William was to pay for the property by making payments at such times and in such amounts as would suit his convenience. In this vew of the evidence the conveyance to appellees was not a mortgage for $2300 or any other sum, but was a conveyance of the legal title to appellees, the equitable owners. Moreover, on appellants' theory of the case the conveyance to Thomas clearly could not be considered a mortgage. Appellants allege in their bill of complaint that the property was an absolute gift, and that the conveyance to Thomas was a "sham", not "real;" that "the signatures to said instrument were obtained by fraudulent misrepresentations;" that they were "procured by fraud in the furtherance of a scheme and conspiracy on the part of" appellees "to defraud" appellants "of their property." The bill of complaint prays that the conveyance "may be set aside and declared null and void." On the pleadings as well as on the evidence appellants are precluded from taking the position that the conveyance was valid and in the nature of a mortgage.

Counsel for appellants contend that "there should have been some finding as to" the "rights" of appellants "in and to said property by the master and the same included in the decree;" that "there are improvements made by appellants amounting to more than $1000 which cannot be disputed;" that appellants "have also paid the taxes thereon, have held the property intact and during all these years it has more than doubled in value."

These questions were not raised in the trial court. Furthermore, on the evidence in the present record they could

It is not suggested that the relevance alone that the state of Illinois has that filling and tax can not of course, that is, Thomas, well on its property as a good neighbor. In as that has evidence, the determination of Thomas in our case filling case can operates in accordance with the property, but that the property belonged in specifiers not was was a gift in filling; that filling was to pay for the property by making payments of less than one in such amounts as would suit his convenience. It this was of the evidence the mortgagee in question was not a creditor for $2500 or any other sum, but was a mortgagee of the least title in appellee, the equitable owner. Moreover, on consideration' merely of the case the mortgagee in Thomas clearly could not be considered a creditor. Accordingly prior to their sale of property that the property was an absolute gift, and that the intention in Thomas was a "done", not "real;" that "the circumstances in said ex- ceptions were altered by Grantor; arrangements;" that they were "precisely as fixed in the intention of a donee and accordingly as the gift" including "a tax-free exemption for their property." The fact of consideration proves that the conveyance "may be not valid and delivered must not hold." In its standing as well as on the evidence considerable are evidence from taking the position that the conveyance was valid and in the nature of a mortgage.

Counsel for appellants contend that "there would have been some finding as to" the "amount of appellants" in use to sell property by the mortgagee and the same indicated in the dec- ree;" that "there are inconsistent with by appellants contention in more than either which cannot be disregarded;" this contention "here also and the same therefore, here held the property actual and taking all terms there is has more than liability in value."

These questions were not raised at the trial court.

Furthermore, on the evidence in the record there was

not be determined. No accounting was taken between the parties. If appellants should be reimbursed for the amounts that they expended on the property, they should also be charged for rental for the use and occupation of the property. There is no issue presented on the evidence as to the rental value of the property. Thomas B. Conroy in his testimony incidentally stated that he could get $40 to $45 a month rent for it, but this testimony was not on the direct issue of the rental value.

There is no evidence in the record on the question of the amounts expended by appellants, except the testimony of appellant William M. Conroy. The matter of an accounting between the parties was not contemplated when the testimony was taken.

For the reasons stated in the opinion the decree of the trial court is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McBurely, J., concur.

not be retained. In contracting one party injures the partner. If accidents happen to relations for the amounts that they expended on the property, they should also be charged for rental for the use and occupation of the property. There is no issue presented as the minimum as to the rental value of the property. Thomas M. Cooley in his treatment fundamentally stated that an equity put forth in the pleadings only that it, but this instrument was not on the direct issue of the initial trust.

There is no evidence in the record as the question of the amounts expended by plaintiffs, nor the testimony of appellee William T. Cooney. The matter of accounting has been the working the not contained when the testimony was taken.

For the reasons stated in the opinion the decree of the trial court is affirmed.

JUDGMENT AFFIRMED.

Burnett, J., and Kennedy, J., concur.

Rev. filed 12-10-23 Mo. Sup. Ct. denied Jan. 4, 1924 Rehd. denied Dec. 24, 1923

(34694)

206 - 28041

GREGORY VAN METRE, Administrator of the Estate of HAROLD B. BINGHAM, Deceased,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY and CHICAGO RAILWAYS COMPANY,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

232 I.A. 612

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action of trespass on the case for damages brought by Gregory Van Metre, administrator of the estate of Harold B. Bingham, deceased, appellee, against the Chicago City Railway Company and the Chicago Railways Company, appellants, in which it is alleged that Bingham died from injuries caused by the negligence of appellants. The case was tried before a jury and the jury returned a verdict in favor of appellee for $4,000. The principal facts are substantially as follows:

Bingham, the deceased, and his wife, May Bingham, started for a ride with a man named John Hold and his wife, Antonette Hold, in an automobile owned by Hold. They had proceeded only a short distance when Hold's automobile got out of order and would not run. A man by the name of Manhal, who was passing by in another automobile, offered to tow Hold's automobile. Hold obtained a rope and adjusted it to the automobiles and the automobiles then proceeded in an easterly direction on the right hand side of 26th street. After they had gone some distance the rope broke and it was necessary to readjust it. A man by the name of Vilchak was riding with Manhal and was standing on the running board of Manhal's automobile. Manhal testified that Vilchak was sitting in the automobile with him prior to the time that the rope first broke,

ROBERT VAN ROSS, administrator of the estate of LUCIE E. SIMONS, Deceased, Appellant, vs. ORLANDO CITY SAVINGS COMPANY and ESTHER MARSHALL COLBERT, Appellees.	APPEAL FROM THE SUPREME COURT OF OHIO.

23214. 312.

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

This is an action of trespass on the case for damages brought by Charles Van Ross, administrator of the estate of Lucie E. Simons, deceased, against the Orlando City Savings Company and its Orlando Savings Company, appellants, in which it is alleged that Simons died from injuries received by the negligence of appellants. The case was tried before a jury and the jury returned a verdict in favor of appellee for $1,000. The pertinent facts are substantially as follows:

Simons, his wife, and his wife, Ray Simons, started for a drive with a new model Ford car and his wife, Antoinette Ray, in an insurance agent by trade. They had proceeded only a short distance when Ford's automobile got out of order and would not run. A man by the name of Kinnel, who was working in an adjoining automobile, attempt to fix Ford's automobile. Kinnel succeeded in so doing it was necessary to go about 200 feet to the 24th street. After they had gone some distance the car again got out of order and was stopped in front of Kinnel's automobile. Kinnel testified that Simons was sitting in the automobile with the wife by the side and the car was stopped

but that after that he "got out and stood on the running board" of the automobile "opposite the front seat so that he could look back and see everything was coming all right." A street car of appellants going in the same direction as the automobiles came up to the automobiles and followed behind them at a distance of 35 or 40 feet. The accident occurred at a point on 26th street about 100 or 150 feet west of Francisco avenue. Bingham, the deceased, was thrown out of Hold's automobile and his leg was run over by the street car.

The evidence as to how the accident occurred is conflicting and very unsatisfactory. According to the evidence in behalf of appellee, Bingham, the deceased, was thrown out of Hold's automobile by a collision with the street car and the automobile. On the other hand, according to the evidence of appellants, the street car did not come in contact with the automobile at all. The evidence in regard to the collision rests largely on the testimony of Mrs. Hold. She was not in either of the automobiles, but was walking in the street behind Hold's automobile at a distance of "not quite a block." On direct examination Mrs. Hold testified that the street car "brushed" or "scraped" the "side of the automobile," and that when this happened "something fell out" of Hold's automobile, and "the street car kind of brushed it along;" that when the "street car brushed the side of the automobile the automobile was two or three feet" from an iron post in the street near the curb on the same side of the street as the automobiles were on. On cross examination she testified that it was "the small rear step of the street car that touched the running board of the automobile."

Hold testified that he felt a "bump" against his automobile and that he was pitched forward and his face struck against his steering wheel, hurting his nose, but that he was not rendered unconscious. He further testified that when his automobile

but that after that he "got out and stood on the running board" of the automobile "opposite the front seat so that he could look and see everything you could all right." A driver, one of eyewitnesses going in the same direction as the automobile came up to the accident and testified that it was at a distance of 30 or 40 feet. The accident occurred at a point on 10th street about 100 or 120 feet east of Jefferson avenue. Blanche, the daughter, was thrown out of Hull's automobile which had run over her by the front wheel.

The evidence as to the accident consisted in conflicting and very unsatisfactory. According to the evidence in behalf of appellee, Blanche, the deceased, was thrown out of Hull's automobile by a collision with the street car and the impact. On the other hand, according to the evidence of appellants, her father had not been in charge with his automobile at all. The evidence in support of the defense rests largely on the testimony of Mrs. Hull. She was not in either of the automobiles, but was looking on the street toward Hull's automobile at a distance of "not quite a block." On direct examination she testified that she saw "Blanche" or "Mrs. Hull" leave the "side of the automobile," and that when this happened "everything went out of Hull's automobile, and the brake was kind of breaking it along;" that when she "turned her because the side of the automobile the automobile was not at first four or five feet in the street near the curb on the east side of the street as the automobile were so. On cross-examination she testified that it was "the small rear step of the wheel and Hull treated the running board of the automobile."

Hull testified that he was a "long" distance in automobile and was in was driving forward on his left side. Leaving the electric wheel, turning the corn, he "did not see anything." He testified that when the automobile

was bumped he saw the street car, and that it was so close to him that "you couldn't get a needle between the street car and my car." He also testified that after his automobile was bumped it ran into an iron post.

Powles, the conductor of the street car, testified that his attention was attracted to the accident when he "heard the crash;" that he could tell from the sound that the crash "came from hitting the post;" that as he looked out he saw the car against the post; that there was "about four feet clearance between these automobiles and the side" of his car when he looked out; that he "looked out immediately" when he "heard that crash." He further testified that from the position that he was in "if any part of that automobile had struck the side" of his car he "would have been able to see it there;" and that "no part of that automobile struck" his car. He also testified that he did not feel the street car run over Bingham's leg, and that if it had run over Bingham's leg he would have felt it.

Miecznski, the motorman of the street car, did not see the accident. He testified that he followed the automobiles "about thirty or thirty-five feet behind;" that he rang the gong for them to get out of the way and "when they got" out to the side they gave" him "the highball to go ahead;" that "there was plenty of room to go by."

There is testimony that the running board on the left hand side of Hold's automobile was damaged. The left hand side of the automobile was the one towards the street car. Hold testified that the "brass strip on the left hand side of the running board was taken off;" that the "linoleum on the running board was turned up" and a "piece cut out about the size of half the running board from the middle of the running board on the front;" that "before the accident the wooden part and the brass of the running board was all right." He also testified that the

was hemmed in and the adjacent car, and that it was so close to his that "you couldn't get a needle between the nearest car and my car." He also testified that after his automobile was hemmed in he saw lights on left side.

Twice, the motorman of the street car, testified that his attention was attracted to the accident when he "heard the crash;" then he again said that upon that crash "once from hitting the curb;" that as he looked up he saw the car ahead the car; that there was "about four feet clearance between these automobiles and the side" of the car that he looked out; that he "looked out immediately" when he "heard that crash." He further testified that from the position that he was in "if any part of that automobile had struck the side" of his car he "would have been able to see it there;" and that "no part of that automobile struck" his car. He also testified that he did not feel the street car run over Bingham's leg, and that if it had run over Bingham's leg he would have felt it.

Alexander, the motorman of the street car, did not see the accident. He testified that he thinking the automobiles "about thirty or thirty-five feet behind;" that he "was the car for them to get out of the way and "when they got out to the side they were" also "too difficult to go ahead;" that "there was plenty of room to go by."

There is testimony that the curbing began on the left hand side of Hall's automobile and ended. The left front side of the automobile was the one towards the street car. Hall testified that the "brass strip on the left rear side of the running board was taken off;" that the "fastenings on the running board was twisted up" and a "piece cut out about the size of half the running board from the middle of the running board to the front;" that "before the accident the engine part and the tires of the running board was all right." He also testified that the

"hub cap on the left side of the front was gone," and that "before the accident there were four new hub caps" on the automobile.

Mrs. Hold and a witness by the name of Marose also testified to the damage done to the running board on the left hand side of Hold's automobile.

Appellants attempted to impeach the testimony of Mrs. Hold in regard to the damage done to the running board of Hold's automobile by the testimony of several witnesses, who stated that when Mrs. Hold's attention was directed to "a scratch on the running board," she stated that it was "an old scratch."

After the accident Bingham, the deceased, was found lying in the street near the street car tracks. His right leg was crushed. According to the testimony of his wife his "right foot was taken off," being held by "his stocking and skin," Mrs. Bingham also testified that "his feet were close to the street car track;" that "his right foot was eight or ten inches from the track" when she "first got down there and saw him;" that she "noticed quite a pool of blood on the pavement about eight or ten inches from the street car track."

Marose testified that Bingham "was lying about 3 or 4 feet in front of the automobile with his head south and his feet north;" that his "foot was about 4 feet away from the tracks."

The conductor of appellants gave a different version of the situation of Bingham's body. He testified that Bingham was "four feet from the street car;" that "his right arm was the closest part of the body" to the street car; that "his head was to the east and his legs to the west;" that he "looked but did not see any blood on the street car track."

The speed at which the street car was going is in dispute. Mrs. Hold says that it was going "very fast." The

"Jud was on the left side of the road the same," said that "before the accident there were four men who appear on the motorcycle.

Mrs. Hoff was a witness for the team of Dwayne also testified in the Hoff-Jud at the parade, stood on the left hand side of Hoff's motorcycle.

Witnesses attempted to impeach the testimony of Mrs. Hoff in regard to the orange dust in the running board of Hoff's motorcycle by the testimony of several witnesses, who stated that when Mrs. Hoff's attorney was allowed to "a mention on the running board," she stated that it was "an old journal."

After the accident Plaintiff, the accident, was found lying in the street near the street car tracks. His right leg was crushed. According to the testimony of his wife his "right foot was taken off," being held by "his stocking and skin."

Mrs. Dingman also testified that "his feet were close to the street car track;" that "his right foot was eight or ten inches from the track" when she "first got from there and saw him;" that she "noticed quite a pool of blood on the pavement about eight or ten inches from the street car track."

Dwayne testified that Dingman "was lying about 3 or 4 feet in front of the motorcycle with his head south and his feet north;" that his "foot was about 4 feet away from the track."

The testimony of eyewitnesses gave a different version of the collision of Dingman's body. He testified that Dingman was "four feet from the street car;" that "his right arm was the closest part of the body" to the street car; that "his head was to the east and his legs to the west;" that he "thought that his foot was by the rail on the street car track."

The cause of which the street car was going is in dispute. Mrs. Hoff says that it was going "very fast." The

motorman said that it was going at the rate of eight or nine miles an hour. The speed at which the automobiles were going is also in dispute. Mrs. Hold, who was following behind them, said they were going about five miles an hour. Manhal, the driver of the automobile in front, said they were going at the rate of about seven or eight miles an hour.

Appellee attempted to impeach the testimony of Powles, the conductor, in regard to his statement that he had taken no names of witnesses on his car, by showing that at the coroner's inquest Powles had testified to taking the names of seven witnesses. On the trial the motorman testified that the conductor had taken the names of witnesses on the car. The conductor testified on the trial that there were no passengers on the car, and that he did not testify at the coroner's inquest that he had taken the names of seven witnesses.

Counsel for appellants correctly state that the ultimate question in the case is this: "Was the motorman reasonably justified in proceeding eastward parallel with and past the two automobiles moving along in the space between the tracks and the curb?"

Counsel for appellee answer the question by stating "that the defendant's street car did not wait a sufficient time to allow a sufficient clearance, but carelessly and negligently tried to pass the towed car and in doing so struck the automobile on the side, knocked the deceased out of the automobile, and that

the deceased's right foot was run over by the street car and from the effects of the accident he died."

Several hypotheses are forcefully argued by counsel for appellants as to how the accident may have occurred without the street car coming in contact with the automobiles. Counsel maintain that on no reasonable hypothesis was it physically possible for the street car to have caused the injury. They assert that the "conclusion is irresistible that the street car had no part in producing the disaster to the automobile which projected Bingham's body upon the track." In all of their hypotheses counsel assume that Bingham's leg was run over by the wheels of the street car. They expressly state that "Bingham's foot was run over by the right wheels of the street car." Again, they ask, "Unless the leg was run over by the car wheel, what could have produced the crushing injury relied on as the cause of death? The automobile wheel could not and did not produce this injury because it could not have possibly passed over his leg." Yet counsel also say that "Powles' version is the only one that is physically possible." According to Powles' testimony, the street car did not run over Bingham's leg. Apparently there is an inconsistency in counsel's position.

The argument of counsel that the street car ran over Bingham's leg is directly opposed to the testimony of Powles, appellants' conductor, and it does not harmonize with other testimony in behalf of appellants. The testimony of Olsen, the motorman of a street car that followed the street car in question was to the effect that Mrs. Hold had stated that "a man was standing on the foot-board of the machine and got squeezed between the post and the machine and got his leg broken."

the doctrine's claim that the rule may by the mere use of force the efforts of the subject to rule."

Crystal Springs's city council voted to amend the ordinance to be the only building use that requires the street and ending in number with the ordinance. Council members that an to permanently prohibited and it objectively possible for the latter and to this change the future. They argued that the "ordinance is discriminatory that the street car had be good in providing the director in the ordinance while protected Slaughter's lady from the street." In all of these appearances council members that Slaughter's log was run over by the wheels of the street car. They unanimously noted that "Slaughter's log was run over by the right wheels of the street car." Again, they said, "Unless the log was run over by the old wheel, this would have prevented the crossing taking place in the cause of death." The authorities stated that only if not because this history because it would not have possibly caused over the log." The council also say that "Martin's decision is the only one that is physically possible." According to Martin's testimony, the street car did not use the Slaughter's log. Structurally there is no conclusive in council's position.

The council of worried that the street car not that Slaughter's log is already caused in the testimony of Martin, an political concerns, and is causing harmonize with other transportation in Amity or elsewhere. The transition of Grant, the municipal of a street car that "Clement the street car in question was the street that car, Grant argued that "a car was driving in the Slaughter's of the municipal and approved between the and the wheels and not all log driver."

We do not think, however, that the testimony in behalf of appellants that the street car did not run over Bingham's leg can be reconciled with the facts, and we agree with the position taken by counsel for appellants that the street car did run over Bingham's leg.

The theory of counsel for appellants as to how the accident actually happened is that after the tow rope connecting the two automobiles broke just before the accident, Hold, who was driving the automobile, "either involuntarily or to overcome the jerk caused by the breaking of the tow rope," gave "the wheel a twist or turn to the right;" that this act of Hold caused the automobile to run into the iron post; that the impact threw Bingham out of Hold's automobile onto the street car track, and that his leg was run over by the street car. There are objections to this theory. According to the testimony of Manhal, a witness for appellats, who was driving the automobile which was towing Hold's automobile, there was no jerk when the rope broke. Manhal testified that "the only way" that he "knew the rope broke was that" he "could feel" his "car go ahead." The size and length of the rope is in dispute. Manhal testified that the rope was about "a half inch rope, eight feet long." Hold testified that it was "an inch and a half rope about twenty feet long." The rope had been broken before the accident and no mishap occurred. It may have been broken in somewhat different circumstances, which would affect its evidentiary weight, but the fact that it was broken before without any accident resulting is a circumstance to be considered in connection with the theory of counsel for appellants that the breaking of the rope caused the accident in question.

Counsel for appellants further contend that on appellee's theory of the accident it was physically impossible

We do not think, however, that the analogy is merely a sympathetic that the street car did not run over Hughes's leg can be reconciled with the facts, but is based with the medicine taken by doctors for appendicitis and the street car did run over Hughes's leg.

The theory of causes for appendicitis is to the effect accident actually happened is that after the car had gone the two automobiles behind just before the accident, that, the car driving the automobile, "either invariably or in proportion the jerk caused by the breaking of the car when," says "the wheel a twist or turn to the right;" that this act of twist caused the automobile to run into the car ahead; that the impact tossed Hughes out of Hold's automobile onto the street car track, and that his leg was run over by the street car. There are objections to this theory. According to the theory of Dr. Hughes, a witness for appellate, who was driving the automobile which was behind Hold's automobile, there was no jerk when the car stopped. Hughes testified that "the only way" that he "knew the car was stopped" he "could feel" his "car go slower." He also not taught of the rope in the climate. Hughes testified that the rope was above "a half inch rope, eight feet long." He testified that it was "an inch and a half rope that really went long." The rope had been broken before the accident and in other respects. It may have been broken in somewhat different circumstances, which would affect its evidentiary weight, but the fact that it was broken before actual car accident essentially is a circumstance to be considered in connection with the theory of causes for appellate that the breaking of the rope caused the injuries to appellate.

Counsel for appellants further argued that Dr. Hughes's theory of the causes of the injuries is not physically possible;

for the street car to have run over Bingham's leg. They argue that assuming that the rear step of the street car came in contact with the running board of Hold's automobile, and that this contact threw Bingham out of the automobile, he could not have been run over by the street car because the rear step was behind both the front and the rear wheels of the street car; that the wheels of the street car therefore would have passed by the automobile before the rear step of the car came in contact with the automobile, and that Bingham could not have been thrown forward with sufficient velocity to cause him to fall in front of either the front or rear wheels of the street car; that in order for Bingham's body to have fallen in front of either the front or the rear wheels of the street car, the body must have been projected at a faster rate of speed than the street car was going, and that "by all the laws of physics no force transmitted from the street car could have caused him to be projected more rapidly than that rapidly moving street car was going."

Counsel for appellants further contend on another hypothesis that on appellee's theory of the accident, even if it be assumed that the rear step of the street car came in contact with the running board of Hold's automobile, and that the impact did not throw Bingham out of the automobile but only deflected the course of the automobile and caused it to run into the iron post, and that the collision of the automobile with the post threw Bingham out of the automobile, Bingham could not have been run over by the street car for the reason previously argued by counsel, namely, that by the laws of physics he could not have been projected at a greater rate of speed than the street car was going, and that this would have been necessary in order that he could have been thrown under either the front or the rear wheels of the street car. As the laws of physics relied on by counsel were not introduced in evidence by

for the street car to have run over Kingdom's leg. They argue that assuming that the rear wheel of the street car came in contact with the running board of Ford's automobile, and that this contact threw Kingdom out of the automobile, he would not have been run over by the street car because the rear wheel was behind both the front and the rear wheels of the street car; that the wheels of the street car therefore would have passed by the automobile before the rear step of the car came in contact with the automobile, and that Kingdom could not have been thrown forward with sufficient velocity to enable him to fall in front of either the front or rear wheels of the street car; that in order for Kingdom's body to have fallen in front of either the front or the rear wheels of the street car, the body must have been propelled at a faster rate of speed than the street car was going, and that "by all the laws of physics" the force transmitted from the street car would have caused him to be propelled more rapidly than that which propelled street car was going."

Counsel for appellants further argued or assumed hypothesis that on appellee's theory of the accident, even if it be assumed that the rear wheel of the street car came in contact with the running board of Ford's automobile, and that the impact did not throw Kingdom out of the automobile but only deflected the course of the automobile and caused it to run into the line with, and take the position of the automobile with the man whom Kingdom got of the automobile, Kingdom could not have been run over by the street car for the reason previously argued by counsel, viz., that by the laws of physics he could not have been propelled at a greater rate of speed than the street car was going, and that this would have been necessary in order that he could have been thrown under either the front or the rear wheels of the street car. In the laws of physics relied on by counsel were not introduced in evidence by

appellants, the only way in which they could be considered would be under the rule that they are matters of which the courtmust take judicial notice. We doubt whether the rule of judicial notice would require the court to solve the problem in physics presented on the record. Moreover, there is not sufficient data in the record from which to reach an accurate or even an approximate solution. The weight of Hold's automobile and the obstructing frictions are some of the necessary facts which are not given by the evidence; nor does the evidence show how far the rear step of the street car was behind the rear wheels of the street car, assuming that the rear step of the street car was be ind the rear wheels of the street car. The missing data would be necessary before it could be determined whether the impact could have thrown Bingham's body under the rear wheels of the street car.

But granting that the contention of counsel for appellants is correct that, on appellee's theory of the accident, the resultant velocity of Bingham's body could not have been great enough for the body to be thrown in front of the rear wheels of the car, the fact on which counsel's contention is based is that the rear step of the street car which came in contact with Hold's automobile was behind the rear wheels of the street car. There is, however, no evidence in the record showing the situation of the rear step relative to the rear wheels of the street car. The rear wheels may have been immediately in front of the rear step or they may have been under the rear step. If they were in front of the rear step, the evidence does not show how far in front they were.

Counsel for appellants state that the street car in question was a "double truck car," and that "in the case of every street car whether double truck or single truck the wheels are all in advance of the rear platform;" that "the rear step is a step to

accident, the only way in which they could be considered would be under the rule that they are matters of motor car accidents take judicial notice. In other words, the rule of judicial notice would require the court to give the problem to practice mechanical on the court. However, there is not sufficient data in the record from which to reach an accurate or even an approximate solution. The weight of Hall's testimony and the contradictory positions are some of the conflicting facts which are not given by the witnesses; nor does the evidence show how far the rear axle of the street car was behind the front wheels of the street car, leaving that the rear tire of the street car was be 1.4 or 1.5 times as the street car. The missing data would be necessary before it would be determined whether his speed would have allowed Hallman's car under the rear wheels of the street car.

For proving that the operation of Hallman's car complained is proved that, on Hallman's theory of the accident, the resultant velocity of Hallman's car would not have been great enough for the car to be thrown in front of the rear wheels of the car; the fact on which counsel's operation is based is that the rear step of the street car which came in contact with Hallman automobile was behind the rear wheels of the street car. There is, however, no evidence in the record showing the alignment of the rear step relative to the rear wheels of the street car. The rear wheels may have been behind the rear step or they may have been behind the rear step or they may have been behind the rear step. If they were in front of the rear step, the evidence does not show how far in front they were.

Counsel for appellants argue that the street car in question was a "double truck car," and that in the case of street car motor vehicle double truck or single truck the wheels are all in advance of the rear platform; that this rear step is a step to

the rear platform;" and that "the rear step is necessarily a number of feet back of each of the rear wheels of the rear trucks of a double truck street car."

We cannot take judicial notice that the street car was constructed in the manner described by counsel for appellants; and on the record the necessary facts are not established which would show such a construction. The argument, therefore, of counsel for appellants that it was physically impossible on appellee's theory of the accident for Bingham's leg to have been run over by the street car is not supported by the facts. On the evidence Bingham's leg may have been run over by the street car; and the accident could have happened in the manner testified to by the witnesses for appellee. Whether it did so happen, and whether it was the result of the negligence of appellants, are questions which were settled adversely to appellants by the jury.

The question for us to determine is whether the contention of counsel for appellants that the verdict of the jury is manifestly against the weight of the evidence is correct. The evidence is conflicting on both material and minor matters. There is a direct conflict as to whether the street car came in contact with Hold's automobile; also a conflict as to whether the street car ran over Bingham's leg. Some of the other issues which are in dispute are as follows: The damage to the left side of Hold's automobile; the rate of speed at which the street car was going; the rate of speed at which the automobiles were going; the size and length of the tow rope; the part of 26th street in which the accident occurred; the distance between the street car and the automobiles at the time the street car attempted to pass the automobiles; whether the rear automobile followed straight in the path of the front automobile; the situation of Bingham's body in reference to the

the rear platform; and that "the head rod" is necessarily a number of feet back of each of the rear wheels of the rear trucks of a double truck street car.*

We cannot take judicial notice that the driver and the conductor; in the manner described by counsel for defendant; and on the record the conflicting facts are not a sufficient basis upon which to make a conclusion. The argument, however, of counsel for appellants that it was physically impossible, on approaching journey of the machine for Kingsman's leg to have been there, may apply to the street car is not supported by the facts. In the original Kingsman's leg may have been run over by the street car, but the machine could have backed in the manner indicated so by the witnesses for appellee. Whether it did so happen, and whether it was the result of the negligence of appellants, are questions which were solely adversely to appellants by the jury.

The contention for or to criticism is directed to the instruction of counsel for appellants that the verdict of the jury is authoritatively against the weight of the evidence is untrue. The evidence is conflicting on both material and minor matters. There is a strong conflict as to whether the driver and conductor of the Kingsman's machine; when a collision is imminent the driver and the over Kingsman's leg. Some of the other matters which are in dispute are as follows: The distance to the left of Kingsman's machine, the rate of speed at which the street car was going; the rate of speed at which the automobile was going; the time and length of the car road; the part of the street in which the machine was carried; the distance between the street car and the automobile at the time the driver and attempted to pass the automobile; whether the rear automobile followed straight in the track of the front automobile; the situation of Kingsman's body in relation to the

street car tracks; the nearness of the pools of blood in reference to the street car tracks, and also whether there was any blood at all on or near the street car tracks; the width of the street at the place where the accident occurred.

In addition to the disputed testimony both sides attempted to impeach some of the witnesses of each other by showing that they had made contradictory statements either at the coroner's inquest or elsewhere.

In view of the conflicting testimony in the case we would not be justified in disturbing the verdict of the jury. "If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by fair and reasonable intendement, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." The Illinois Central Ry. Co. v. Gillis, 68 Ill. 317, 319; Bradley v. Palmer, 193 Ill. 15, 39; Carney v. Sheedy, 295 Ill. 78, 83. To the same effect is Blackburst v. James, 304 Ill. 586, 592. In the case of The People v. Boucher, 303 Ill. 375, the court said (pp. 380-381): "It is the most important function of the jury and their peculiar province to determine the truth of the case, and the opportunity which they have of seeing and hearing the witnesses during their examination and cross examination is clearly superior to that of a court of review, which has before it only a record of the words used by the witnesses." It has also been held that a reviewing court should not set aside the verdict of a jury merely because there may be a doubt of the correctness of the verdict. Illinois Central Railroad Co. v. Cowles, 32 Ill. 116, 121; DeForrest v. Odor, 42 Ill., 500, 501.

We are of the opinion that the verdict of the jury is not manifestly against the weight of the evidence.

Counsel for appellants cite a number of authorities in support of the proposition that "the motorman of a street car has the right to assume that the driver of a wagon going in the same direction in the street outside the car tracks and in advance of the car will not suddenly leave a safe roadway and drive over into the course of the street car, at a place other than a street intersection, where there is no occasion for leaving the available roadway outside the track." The rule of law as stated may be correct, but the question in the case at bar is whether the automobile in which Bingham was a passenger was suddenly driven in front of the street car, or whether the motorman was guilty of negligence in attempting to pass the automobile. In determining this question cases illustrative of the general rules relating to negligence do not afford very much assistance, as each case must be determined largely on its own facts.

Counsel for appellants contend that Bingham was guilty of contributory negligence, and that therefore appellee is barred from a recovery. Counsel maintain that Bingham was negligent, as a matter of law, as well as negligent on the weight of the evidence. The rule stating what constitutes contributory negligence, as a matter of law, is as follows: "As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence (Bale v. Chicago Junction Ry. Co., 259 Ill. 476), but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant." Kelly v. Chicago City Ry. Co., 283 Ill., 640, 645. We are of the opinion that the case at bar does not come within the rule.

After examining the evidence we are also of the opinion that the verdict of the jury finding that Bingham was not guilty of

Counsel for appellants cite a number of authorities in support of the proposition that they maintain if a juror can use the right to answer that the judge of a trial court in the same direction in the above cases which are treated as in response of the one with our federal jury a fair hearing and jury trial into the course of the trial, or, in a case where that is clearly intervention, where there is no evidence for instruct the multiple members within the trial." The fact is the judge may be more free, but the jurors in the cases of the in reviewing the decisions in which judges on a particular the judges before in front of the street and, of whether the motions the point of verification in de- tempting in some the decisions. In determining the question some differences of the counsel from review relating to application to the without any such instances, as such case must be determined largely on its own facts.

Counsel for appellants contend that dismissal was proper of constitutional requirements, as that instruction provides it bound from a remedy. Counsel advance two theories for reversal, as a matter of law, as well as evidence on the merits of the criminal. The rule stating that constitutional constitutionally sufficient, in a matter of law, is as follows: "In a criminal prosecution, the question of constitutionally sufficient in an, of fact for the jury under all the facts and circumstances shown by the evidence (Ohio v. Dalton Tractor Co. Inc., 288 Ill. 474), the same constitutionality arise in which a person is in relation or his consent or violation of all material evidence of course constitutionally is presumed in a line attention that the month and day, in a matter of law, that no criminal person could have voted or be did not vector judgment for the individual." Kelly v. Illinois Bell Tel. Co., 348 Ill., 200, 18. In are of the opinion that the error in the case and jury trial within the case.

After considering the evidence on the date of the matter that the jurisdiction of the jury finding that charges was not guilty of

contributory negligence is not manifestly against the weight of the evidence. The question whether Bingham failed to exercise ordinary care for his own safety was given decided emphasis in the instructions to the jury. There was one instruction given for appellee on this question and five for appellants. The instructions for appellants presented the question to the jury in different forms. In one instruction given in behalf of appellants the jury were told that Bingham was under the duty of using his "faculties with ordinary and reasonable diligence and care" to "avoid danger and injury to himself." Counsel for appellants maintain that Bingham "should have looked out for cars approaching from the rear;" that he "should have shouted to Vilchak to turn the towing car away from the track and for Hold to steer his car towards the right." Whether in the exercise of due care Bingham should have done those things was a question for the jury to decide. The failure to do them was not negligence as a matter of law. Moreover, Manhal, a witness in behalf of appellants, testified that Vilchak was riding on the running board of Manhal's automobile, "so that he could look back and see everything was coming all right." The case at bar is not one where there was an unexpected street car approaching from the rear. The motorman of the street car in question was fully aware of the situation of the automobiles, as according to his own testimony he had followed behind them for almost a block. Counsel for appellants further maintain that Bingham should have got out of the automobile and walked, as Mrs. Hold did. We do not think that the situation was one of such apparent danger that Bingham was guilty of negligence in remaining in the automobile. Furthermore, Mrs. Hold did not walk because there was any danger in riding in the automobile, but merely because of her heavy weight.

Counsel for appellants further maintain that Mrs. Bingham was guilty of contributory negligence and, being the sole beneficiary, cannot recover. No instruction was given to the jury on the

contributory negligence in not immediately warning the owners of the estimate. The question answer figures failed to establish contributory fault for his own safety was given against numerous by the instructions to the jury. There was no instruction given for appellee on this question but that for appellants. The instructions for appellants presented the question to the jury in different terms. In one instruction given to behalf of appellants the jury were told that Kingdom was under the duty of using the "facilities with activity and reasonable ability and care" to travel under and injury to himself." Proceeding for appellants maintain that Kingdom should have looked for his own safety before attempting to cross the tracks. The question is "Should Kingdom have exercised care for his safety?" That is "should Kingdom have looked for the train?" That is "should Kingdom have looked to see if the train was coming from the right and for this to stop his car because the right?" Whether in the exercise of the care Kingdom should look from these things was a question for the jury to decide. The failure to do that was not negligence as a matter of law. However, Kingdom, a witness in behalf of appellants, testified that Vigdor was riding on the running board of Kingdom's automobile, "We that he would look that and are approaching now looking all right?" The case of Ker is not one where there was no motorman present was approaching from the right. The motorman of the street car in question was fully aware of the situation of the automobile, so approaching to his car sufficiently to see failures making them the street car. Conceded for argument further contention that Kingdom should have put out of the automobile and walked in the, that is. To do not think that the circumstances was not of such character that Kingdom was guilty of negligence in approaching in the automobile. Furthermore, Ker, that did not make Kingdom guilty of negligence in failing to the car warning, the safety because of his injury malice.

Counsel for appellants further contend that Mr. Kingdom was guilty of contributory negligence. Mr. Kingdom was invited alone, which contention, in instructing the jury in the left to the jury

question whether contributory negligence on the part of Mrs. Bingham would defeat a recovery. From the instructions it would appear that this issue was not raised on the trial. If Mrs. Bingham was guilty of contributory negligence, she cannot recover, as the contributory negligence of a beneficiary who may be entitled to share in the amount received bars the action. Hazel v. Hoopeston-Danville Bus. Co., 310 Ill. 38. From a consideration of the evidence, however, in the case at bar, we are of the opinion that Mrs. Bingham was not guilty of contributory negligence.

Counsel for appellants further contend that "there is no evidence that plaintiff's intestate died as the result of injuries sustained in the occurrence sued on." The evidence shows that Bingham's right leg was severely crushed; that his right foot was held by "his stocking and skin." Mrs. Bingham testified that "he did not lose consciousness at any time; but he was suffering terribly, in great pain." She further testified that he was taken to the hospital, where he remained in bed until he died, which was about thirteen days after the accident. The only direct evidence of the cause of his death is the statement of a doctor. Who the doctor was does not appear from the evidence; whether he was the attending physician or whether he was the coroner's physician the evidence does not clearly show. All that appears from the evidence in regard to the statement of the doctor and the way in which it was introduced in evidence is as follows: Mrs. Bingham was asked the question by counsel for appellee as to what her husband died from. This question was objected to by counsel for appellants and the objection was sustained. The following colloquy then took place between the court and counsel:

> "Counsel for Appellee: Do you want me to bring the doctors?
> Counsel for Appellants: I am willing to introduce the doctor's statement that he gave at the inquest.
> The Court: Well, pass that and go to the next question; take that up later.
> Counsel for Appellee: There is no question --
> Counsel for Appellants: Yes, the doctor's statement at the inquest, that tells what he died of. I have no objection to you reading it into the record. I have got it right here if you want it.
> Counsel for Appellee: I haven't got it.
> The Court: Finish with this witness, gentlemen, and take up that other question later on. Finish with this witness.

question whether testimony negligence on the part of the plaintiff would defeat a recovery. For the instructions it would assume that this issue was not raised in the trial. If such, Judge Cooley's or Judge Thompson's opinions, the cases treated, or the constitutional provisions of a number of states the way in which it is shown in the common statutory form the action. Dyer v. Chicago, Rock Island & Pac. Ry., 54 Ill. 54. For a complete elaboration of the evidence, however, in the case at bar, we see no of the opinion that the Kansas law not only of constitutional provisions.

Counsel for appellee further contend that there is no evidence that plaintiff's intestate did in his lifetime or had ever believed in the doctrine of the. The evidence shows that plaintiff's right has been generally recognized that his right was held by "his preaching and life." Mrs. Hudson testified that "he did not have conversations of any kind; he or the conference testimony, he never said." The further testimony that he was known in the community, where he preached he was until he died, which was many thousand days after his death. The only direct evidence of the state of his mind is the testimony of a witness. When the doctor was that he not agreed from the religious views he was the minister religious or doctrine. In the his counsel's questions the evidence does not clearly show. All that remains from the evidence is regard to the statement of the doctor not say he is going to die in the doctrine based in evidence taken trial: Mrs. Hudson not quote the question by counsel for appellee as to what her husband said to Mrs. This question was objected to by counsel for appellee and the objection was sustained. The following colloquy then took place between the court and counsel:

> "Counsel for appellee. Do you want me to state the question?
> Counsel for appellant. Yes, sir; I want to introduce the doctrine's statement into the case in the lifetime.
> The Court: Well, state that and I'll see what question, then that is fair.
> Counsel for appellee. Doctor is he dissatisfied ...
> Counsel for appellant. Yes, the doctrine's statement in the lifetime, that this is what he said of. I have no objection to you stating it in his own words. I have not it right here if you want it.
> Counsel for appellee. I know's not it.
> The Court. Plaintiff will take exception, gentlemen, we have to that other question later on. Strike with this question.

Counsel for Appellee: Well, this is apparently taken from the coroner's inquest.

Counsel for Appellants: That is the statement of the doctor, that he gave.

Counsel for Appellee: And the doctor -- Well, shall I read it?

Counsel for Appellants: I have no objection.

Counsel for Appellee: Injuries: Crushing injury of right foot and leg; abrasion of right hip and back. Contributing causes: Infected amputation wound of right leg, acute peritonitis, acute bronchial pneumonia. Cause of death: Bronchial pneumonia, acute peritonitis, secondary to crushing injury to right foot and leg.

Counsel for Appellants: And that is signed by the doctor?

Counsel for Appellee: Yes."

It is maintained by counsel for appellants that neither bronchial pneumonia nor acute peritonitis, the diseases mentioned in the statement as the "cause of death," could be caused by the injuries received by Bingham. Counsel assert that the "nature of both these diseases is a matter of common knowledge;" that "it is common knowledge neither of these diseases can be caused by traumatism other than by penetrating injury carrying with it, and applying infection to the surface of the bronchial tubes or to the peritoneum;" that "there was no such penetrating injury in the instant case;" and that "it is impossible that an injury to Bingham's foot caused acute peritonitis or acute bronchial pneumonia." There may be a doubt whether it "is a matter of common knowledge" that the injury to Bingham's leg would not cause bronchial pneumonia and acute peritonitis. It would seem to be highly improbable that there could be a direct causal connection between the injury and bronchial pneumonia and acute peritonitis. But if it is a fact that there could not be any such causal connection, is that fact one so generally and commonly known that a court could take judicial notice of it? The question, however, whether bronchial pneumonia and acute peritonitis resulted directly from the injury to the leg is not the question presented on the record in the case at bar. The precise question raised by the contention of counsel for appellants is whether the court can say, as a matter of

judicial knowledge, without any proof, that the statement of the doctor, considered in connection with the evidence relating to the injury, is erroneous. In other words, can it be said on all of the evidence that the fact that there could be no causal connection between the injury and the death is so well known, as a matter of common knowledge, that no proof is required? The statement of the doctor is not confined only to a statement concerning bronchial pneumonia and acute peritonitis. There are other things contained in the statement; and as the entire statement relates to the injury and death of Bingham, everything in it must be considered in determining its meaning. The statement says that there was a "crushing injury of right foot and leg" and an "abrasion of right hip and back;" it also states that the "Contributing causes were infected amputation wound of right leg, acute peritonitis, acute bronchial pneumonia." The phrase "contributing causes" as used in the statement necessarily refers to causes contributing to the death of Bingham, as the statement relates only to his death. No other meaning could be given to the phrase on a fair interpretation of it. The statement does not say that bronchial pneumonia and acute peritonitis were the primary and only cause of death, but it states that these diseases were "secondary to crushing injury to right foot and leg." From the statement it does not appear that bronchial pneumonia and acute peritonitis were directly caused by the injury to the foot and leg, or that they were the only cause of death. It is true that the statement says they were the "cause of death," but it also says that they were "contributing causes," and that they were "secondary" to the crushing injury to the foot and leg. The statement further states that the "infected amputation wound of right leg" was one of the "contributing causes." From a fair and reasonable construction of the statement we think the meaning it intends to convey is this: That the primary, proximate, or dominant cause of death which set

initial hearsay, without any proof, that his statement of the
facts, considered in conjunction with the evidence relating to the
injury, is erroneous. In other words, one is to make up his mind on all
evidence that the fact that there could be no causal connection be-
tween the injury and the death is so well known, on a matter of
common knowledge, that no proof is required. The statement of the
doctor is not material only in a judgment concerning traumatic
pneumonia and acute pneumonia. There are other factors involved
in the statement; and as the medico statistical relative in the in-
jury was basis of judgment, contributorily it must be considered in
determining its weight. The evidence says that there was a
"growing history of right foot and leg" and of "abrasion of right
hip and back;" it does appear that the "contributorily caused were
inferred separate and apart of right leg, acute pneumonia, acute
bronchitis, pneumonia." The phrase "contributorily caused" is used in
the statement apparently intent to convey substantially the
basis of judgment, as the evidence relates only to the basis.
So other meaning could be given to the phrase or a fair interpre-
tation of it. The statement does not say that bronchitis, pneumonia
and acute nephritis were the primary and only causes of death,
but it states that these diseases were "contributory to proximate
injury to right foot and leg." From the statement it does not
appear that medical governing and acute nephritis were di-
rectly caused by the injury to the foot and leg, or that they
were the only causes of death. It is true that the evidence says
they were the "causes of death," but it also says that they were
"contributorily caused," and that they were "secondary" to the
crushing injury to the injured leg. The statement further states
that the "inferred conclusion caused of right leg" was one of the
"contributorily causes." From a fair and reasonable construction of
the statement we think the meaning is indicate in answer is right:
That the pneumonia, bronchitis, or nephritis causes of death only was

the other causes in operation was the crushing of the right foot and leg; that the infected "amputation wound" of the right leg, bronchial pneumonia and acute peritonitis were contributing causes to death; and that bronchial pneumonia and acute peritonitis were the immediate cause of death. In other words, if it had not been for the crushing of the foot and leg there would have been no amputation and no bronchial pneumonia nor acute peritonitis. It may be inferred that pain and suffering followed from the amputation. Pratt v. Davis, 224 Ill. 300, 309. The inference also follows that the amputation with the consequent pain and suffering would have weakened Bingham and rendered him less capable of resisting the effects of bronchial pneumonia and acute peritonitis. The statement must also be considered in connection with the evidence relating to the injury. The evidence shows that the leg was crushed to such an extent that the foot was held only by "the stocking and skin;" that the bleeding from the wound at the time of the injury caused "quite a pool of blood on the pavement;" that Bingham was "suffering terribly, in great pain;" that he was taken to the hospital; that he died thirteen days after the injury, and remained in bed during all of that time. This evidence, together with the statement of the doctor, in our opinion establishes at least prima facie that Bingham died as the result of the injury. The view we have adopted is in accordance with decisions in which a somewhat analogous question was considered. In the case of Freeman v. Mercantile Accident Association, 156 Mass. 351, which was an action on an insurance policy, the insured died of peritonitis localized in the region of the liver, and the evidence tended to show that it was induced by a fall. There was also evidence indicating that he had previously had peritonitis in the same part, and that the previous disease had produced effects which rendered him very liable to a recurrence of it. The insurance policy provided that the benefits should not extend to any case in which there should be no symptom

or visible sign of bodily injury, nor in which death or disability occurred from disease, "nor to any case except where the injury is the proximate cause of the disability or death." In affirming the judgment in favor of the plaintiff the court said (p.353): "The principal question in the case is: What kind of cause is to be deemed proximate within the meaning of the policy? Where different forces and conditions occur in producing a result, it is often difficult to determine which is properly to be considered the cause, and, in dealing with such cases, the maxim, Causa proxima non remota spectatur, is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so, as well when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes." It will be observed that in the above case it was shown by the evidence that peritonitis could be "induced by a fall."

In the case of Isitt and others, Executors, v. The Railway Passengers Assurance Company, Law Reports 22 Queen's Bench Division, 504, which was an action on an insurance policy, the terms of the policy provided against "death from the effects

or visible sign of lasting injury, nor is which there is insufficient
assumed some injury, that is, any some sense, [illegible] the injury
in the proximate cause of the invalidity or death." In addition
the judgment in favor of the plaintiff was upheld (p.[illegible]):
"The principal question in the case is: Was the act of cause in so
as damage proximate within the meaning of the [illegible]? Where a different
factor not [illegible] under in [illegible] a [illegible], it is often
difficult to determine which is responsible for producing the
damage, and, in dealing with such cases, the courts [illegible]
[illegible] [illegible], in reality. Our [illegible] [illegible]
cause or condition which is remote in time or space to the result
is unnecessarily to be deemed the proximate cause. It might [illegible]
law will not, or further that in the [illegible] [illegible] is right
the action, [illegible], proceeding alone, if which the [illegible]
contribution is a natural and [illegible], in view of
the existing circumstances and conditions. The law [illegible]
under the cause of action [illegible] the [illegible]
cause, which, [illegible] is [illegible] [illegible]
[illegible] [illegible] in [illegible] [illegible]
produced the effect. In [illegible] [illegible]
death is a result of a [illegible] [illegible] [illegible]
the cause of the death, if he dies by reason of it, even if he
might not have died if his [illegible] [illegible] [illegible]
[illegible]; but this is so, as well when [illegible] [illegible]
medium of a [illegible] [illegible] by the injury, as when the
injury immediately [illegible] the [illegible]." It will be
observed that in the [illegible] [illegible] it was shown by the evidence that
[illegible] [illegible] "[illegible] by a [illegible]."

In the case of [illegible] and [illegible], [illegible], the
[illegible] [illegible] [illegible], [illegible] [illegible] [illegible]
[illegible], [illegible], [illegible] [illegible] [illegible] [illegible] [illegible],
the [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible]

of injury caused by accident." The assured fell and dislocated his shoulder. He was put to bed and died of pneumonia in less than a month from the date of the accident. Huddleston, B., in his opinion said (pp. 509, 510, 511): "I have felt some difficulty as to the question of law intended to be raised. I assume, however, that the umpire finds that the accident was not, as a matter of fact, the proximate cause of the death of the assured, and that therefore, according to his own opinion, the assured did not die 'from the effects of injury caused by the accident,' but that he leaves it to the Court to say whether or not, as a matter of law, having regard to the medical history of the illness as stated in the case, it ought to be held that the assured died from the natural consequences of injury caused by accident,' and therefore from 'the effects of injury caused by accident' within the meaning of the policy. This being the question of law raised, I think it important that the terms of the policy seem themselves to draw a distinction between the accident and its 'effects.' The words are, 'if the assured shall sustain any injury caused by accident, * * * * * and shall die from the effects of such injury.' These words appear to me to mean that the injury must be immediately caused by the accident but that the death need not be immediately caused by the injury. Now I think that the facts stated by the umpire do shew that in this case, though the injury was not the proximate cause of the death of the assured, yet his death did ensue from the natural consequences of the injury. * * * * The assured fell and dislocated his shoulder; he was in consequence confined to his room; he there suffered pain, became restless and unable to wear his clothes, and was reduced to a condition of debility. He thus became unusually susceptible to cold; he caught cold, and in consequence pneumonia; and he died of pneumonia. These facts appear to me to constitute a chain of circumstances

leading naturally from the injury to the death. The question of law is then whether or not, as a matter of law, the chain of circumstances ought to be taken into consideration as 'effects' under this insurance. Construing, as I do, the terms of the insurance as meaning that the injury must be immediately caused by the accident, but that death need not be immediately caused by the injury, I answer this question in the affirmative. I think the circumstances which followed were in contemplation of law 'effects' of the injury. I am, therefore, of opinion that the assured died 'from the effects of the injury' within the meaning of the policy, and that the plaintiffs are entitled to recover the amount of the insurance." Willis, J., "I am of the same opinion. * * * "

In the case of The National Benefit Association of Indianapolis v. Grauman, 107 Indiana 288, in which an action was brought on a certificate of membership issued by the National Benefit Association, the assured died of apoplexy as the result of injuries received in two falls. In considering the objection urged against the complaint that it failed to aver that the death of the assured "did not result from disease," the court said (pp. 289, 290): "It was stipulated in one of the printed conditions annexed to the certificate of membership, that the benefits of the certificate should not extend to any case in which there were no symptoms or visible sign of bodily hurt, nor to any case in which death or disability should occur in consequence of disease. We agree that in order to recover death must have occurred within the limits of the risk assumed by the contract. The condition above mentioned limited the risk to a case of death, proximately caused by physical injuries, of which there should be some visible external sign. It excluded liability in case death resulted from disease or bodily infirmity. The complaint, however, made a case within the rule above stated. It is averred in both

treating materially from the injury to the person. The question of the in rem application of par. (a) is quite different, for it deals with circumstances which go to the existence of the 'offence' under this instrument. Accordingly, on the face of the instrument we consider that the injury can be identified means by the statute, and that such proof can be sufficiently adduced by the injury. I answer this question in the affirmative. I think the circumstances which relevant under the qualification of the 'offence' of the injury. I am, therefore, of opinion that the answer that 'the offence of the injury' within the meaning of the notice, and that the plaintiffs are entitled to recover the amount on the counterclaim." (Pilling J., at p. 7 of his judgment.)

In the case of The Canadian Pacific Navigation Co. Bedfordshire v. Ferguson, 1917 (Pilling J.), in which an action was brought on a particulars of merchandise lost at by the Canadian Pacific navigation, the matter did not of anything on the result of injuries received in the claim. In overruling the objection taken against the complaint that it failed to aver that the death of the deceased "did not result from piracy," the court said (p. 8): "It was alleged that in not of the ordinary meaning because in the certificate of merchandise, that the mentions of the insurance should not extend to the case in which there were no injuries or visible sign of loss; but in any case in which death or disability should occur in consequence of disease. It appears that in order to receive their real loss covered within the limits of the risk assumed by the insurance. The additional words mentioned limited the risk to a case of loss, consequently means by ordinary language, of which there might be some visible external sign. If disease disability is some death resulting from disease or bodily injury. The insurance, however, made a case within the wide above phrase. It is strange in such

paragraphs that the assured sustained certain bodily injuries, which were occasioned by two separate falls, the effects and results of which are minutely described. The injuries were in part external and visible. They resulted in apoplexy and death. The averments leave no room to doubt that death resulted from bodily injury, and not in consequence of disease. The fall and injury upon the head may have resulted in apoplexy. That the injury resulting from the fall produced a condition, aptly designated by that name, did not render it any less the cause of death."

The case of Traveler's Insurance Co. v. Murray, 16 Colo. 296, was an action on an accident insurance policy. The assured died of peritonitis resulting from an unsuccessful surgical operation for hernia which was caused by a blow in an accident. The terms of the accident policy insured against death "from bodily injuries effected through external violent and accidental means," but excepted death from hernia, or medical or surgical treatment. The court said (pp. 304, 305): "That the insured died from peritonitis resulting from the surgical operation is unimportant, when the fact is established that death was inevitable without the operation, and that, after a consultation of skilled physicians the operation was resolved upon - necessarily dangerous - as the only possible means of preserving life. It is ably urged in argument that deceased died of hernia, a cause of death excepted by the policy. * * * * We cannot adopt the construction of the exception in the contract of insurance so ably urged. The hernia must be regarded as the result of the accident that caused the death; the cause of death, the force of the blow received; the consequent injury arising from the concussion, and the hernia as resulting. Deceased was insured against the accident by the terms of the body of the policy. Had he died of ordinary hernia, not produced by a serious and violent injury, appellant would probably have been released from payment; but when the hernia is the accidental result

of the force of the blow, it cannot be regarded as excepted."

Counsel for appellants maintain that "where the ailment claimed to have resulted from an accident is too remote to justify an inference that it was caused by such accident, expert testimony must be introduced to show that the injuries actually sustained were capable of producing the ailment complained of." This may be true. But we do not understand that counsel for appellants are contending that the statement of the doctor is not the opinion of an expert. Apparently their only contention is that the doctor's opinion is manifestly erroneous and contrary to common knowledge. In the state of the record we do not think that appellants are in a position to maintain that the statement of the doctor is not the opinion of an expert. The record shows that the statement was admitted without any objection whatever on the part of appellants. All objections to the competency of the statement and to the qualifications of the doctor have, therefore, been waived by appellants. By allowing the statement to be introduced without objection appellants have admitted for the purposes of this record that the doctor who made the statement was qualified to express an opinion as to the cause of death. The question to be determined then, is whether this court can say, as a matter of judicial knowledge, that the opinion of the expert is erroneous. It would seem that if the question is one which comes within the province of experts, as counsel for appellants contend, the court could not oppose or attempt to controvert the opinion of the expert with merely general or common knowledge. "A matter properly a subject of judicial notice must be 'known,' that is, well established and authoritatively settled, not doubtful or uncertain." 15 R.C.L. p. 1059. If an expert should express an opinion which was obviously contrary to common knowledge, it could be rejected. For example, if an expert should state that pneumonia was not a disease, or that pneumonia would not cause death, a court could say, as a matter of

common knowledge, that such an opinion was palpably incorrect. But where the question is one about which there may be a doubt, a court cannot properly say, as a matter of judicial knowledge, that the opinion of an expert is erroneous. The opinion of the expert might seem highly improbable to one without special knowledge on the subject, but the court could not refuse to accept it for that reason alone. In the case of Schaefer v. Union Railway Co. of New York City, 149 N. Y. Sup. 290, cited by counsel for appellants, in which the effect of a blow was being considered, the court said (p.291): "To the lay mind it may appear that the blow had some causative relation to the apoplexy, with consequent paralysis, either eventuating in it after distressing illness, or contributing to it by overtaxing and thereby enfeebling parts, perchance predisposed by disease. But such a conclusion can be reached legally only by the opinion of persons who are by study and experience prepared to trace the effect of the blow from its delivery to the consummation of injury." If, however, the statement of the doctor should not be considered as an opinion of an expert, it states facts which, taken in connection with the other evidence relating to the injuries, establish, in our opinion, a causal relation between the injury and the death. In other words, the evidence shows that the injury was the efficient, proximate cause of death.

Counsel for appellants cite a number of cases to the effect that the law requires that the causal connection between an injury and death must be established with reasonable certainty, and that if it is equally probable that death resulted from another cause than the causal connection between the injury and death, the cause of death was not been proven. In those cases there was conflicting testimony of experts as to the cause of death, and the cause of death was therefore a disputed issue. In the present case no expert testimony, and no testimony of any kind, was introduced by appellants to controvert the opinion that the doctor expressed

cannot manifestly, that may be without the relevant information. But where the question is one about which there may be a doubt, a court cannot correctly say, or a majority of judicial tribunals, that the opinion of an expert is erroneous. The opinion of the expert might seem highly unreasonable to one without special knowledge on the subject, but the court could not refuse to accept it. See that case alone. In the case of *Dunbar v. Lower Mainland Dairy Co. of New York Ltd.* [1] v. Kan. 91, after by examining the evidence, in order the effect of a tire was being considered, the court said (p.93): "In the end it was decided that the tire was some connection in relation to the accident, with consequent penalties, without everything in it after discarding claims, or omitting it, or it by overcoming and thereby adopting results, introduce specialized by lawyers. But such a conclusion can be reached legally only by the application of rules the by study and constructive thought to stage the effect of the tire from its activity in the accumulation of latent. If, however, the statement of the doctor should not be considered as an opinion of an expert, it stands there with, taken in conjunction with the other evidence relating in the injury, probability, to the question, a sound medical judgment the injury and the death. In other words, the evidence must that the injury was the efficient, proximate cause of death.

Cases for consistent with a number of cases in the effect that the jury decision that the causal connection between an injury and death must be established with reasonable certainty, and that it is equally possible that death resulted from another cause than the causal connection between the injury and death, the cause of death was not been proven. In these cases there was conflicting testimony of experts as to the cause of death, and the cause of death was attributed a plausible cause. In the present case no experts testimony, and no testimony of any kind, was introduced by claimants to contradict the evidence that the doctor expressed

in the statement. The statement does not leave the question of the cause of death to surmise and conjecture. The cause and contributing causes are stated, and the only question is whether they are correctly stated. In the absence of any evidence to the contrary we think that the opinion of the doctor, when considered in connection with the facts and circumstances relating to the injury, must be accepted as correctly stating the cause of death. Counsel for appellants particularly call our"attention to the views of this court as expressed" in the case of Red Cross Medical Service Co. v. Green, 126 Ill. App. 214, 219, 220, "on the impossibility of ascribing the death of one suffering from pneumonia to anything other than the disease." In that case the court did not hold generally that when a person had pneumonia and died, that pneumonia could be considered as the only cause of death. The court merely stated that "it is a matter of universal experience and a thing of which all courts may take judicial cognizance, that men, young, strong, healthy, given skilful and assiduous medical treatment by eminent physicians and careful nurses, in spite of all that human means can do, die of pneumonia;" that "it is the disease that kills them, not medical treatment or the want of it." In expressing these views the court was considering the question whether the deceased died from pneumonia or from the neglect and unskilful treatment of the disease by the physician.

Counsel for appellants further maintain that the court committed reversible error in giving the following instruction: "You are further instructed, as a matter of law, that the question of whether or not the defendant was guilty of negligence is for your determination upon all the circumstances and facts proven in the case, under the instructions of the court."

It is argued by counsel for appellants that the instruction is erroneous because it does not limit the negligence to the negligence alleged in the declaration, and that the jury might be

in the statement. The statement does not issue the question in the
course of death in certain and unknown. The court may instrucl-
bution, causes are stated, and the only question is whether they are
material evidence. In the absence of any evidence to the contrary
we think that the opinion of the doctor, when confined to causes
than with the fact; and circumstances relating to the injury, must
be accepted as correctly stated (b) cause of death. Counsel for
appellants unfortunately such re-examination in the view of this
court as erroneous" in the case of Del Grand Railway Company v.
Green, 111 Ill. App. 641, 647, 648, "on the impossibility of ex-
plaining the death of the particular loss possessed at supposing that
that the disease." It did seem the error did not rule generally
that such a person had consented was fatal, that behaviour could
be considered as the only cause of death. The court merely stated
that "it is a matter of universal knowledge, or a fact of which
all people may take judicial cognizance, that men, women, children,
healthy, drive skilful and cautious medical treatment by reasons
operations and careful nurses, in spite of all that human means
can do, are of consequence" that "it is the disease that kills them,
not medical treatment or the want of it." In concluding from which
the court was considering the question whether the deceased died
from pneumonia or from the medical and unskilful treatment of the
disease by the physician.

Counsel for appellants further argument that the court
erroneously refused error in giving the following instruction:
"The one further instructed, as a matter of law, that the question
of whether or not the attendant was guilty of negligence is for
your determination from all the circumstances and facts coming in
the case, under the instructions of the court."

It is argued by counsel for appellants that the instruc-
tion is erroneous because it does not limit the application to the
negligence alleged in the declaration, and that the jury might be

left free to find appellants guilty of any negligence of which they might think or imagine them to be guilty, even though such negligence was not averred in the declaration.

As the instruction was not a peremptory one directing the jury to return a verdict for the plaintiff, it does not have to contain in itself all the elements essential to authorize the verdict. Other instructions were given which expressly tell the jury that the negligence to be determined is the negligence alleged in the declaration. The instructions are to be considered as a connected series. When the instruction complained of is considered in connection with all of the other instructions, it cannot reasonably be presumed that the jury were misled by the instruction into imagining that they could consider any negligence of which they might think appellants guilty even though such negligence was not alleged in the declaration. The giving of the instruction has been held not to constitute reversible error. Chicago City Ry. Co. v. Roach, 180 Ill. 174; Chicago City Ry. Co. v. McDonough, 125 Ill. App. 223.

It is also urged by counsel for appellants that the following part of an instruction given on behalf of appellee is erroneous: "The jury should not be influenced in the slightest degree as to the facts in the case by any assertion or statement of counsel on either side of the case, unless the same is sustained by evidence in the case."

Counsel argue that this instruction is fatally defective because it deprived counsel of the right of making any argument "based upon common observation or experience;" and that it "commanded the jury to disregard the argument of counsel based on principles of law applicable to the facts because such an argument could not be directly based on the evidence." We do not think the construction which counsel for appellants have placed on the instruction is a fair and reasonable one. The

into case in that constitute guilty or not instructions of ways they state crime or describe them in the policy, and should not discuss the act involved in the defendant.

In the instructions was not a violation and therefore the jury to review a verdict for the plaintiff, it did not have to decide in light of all the evidence presented in connection the verdict. Other instructions were given which expressly said the jury that the negligence to be determined is the negligence alleged in the complaint. The instructions are to be considered as a unanimous entire. When the instruction complained of is considered in connection with all of the other instructions, it cannot reasonably be assumed that the jury were misled by the instructions into thinking that they would consider any negligence or acts they might think constituted policy even though such acts were not alleged in the complaint. Failure of the instructions has been held not to constitute reversible error.

Gulbrand Ship Co. v. Lund, 194 Ill. 174; Gulbrand Ship Co. v. Schumacher, 197 Ill. App. 181.

It is also argued by counsel for appellants that the refusing part of an instruction asked on behalf of appellants is erroneous: "The jury should not be instructed as the allegations appear on the first page of the case by any reading or statement of counsel or other side of the case, unless the same is established by evidence in the case."

Counsel argue that this instruction is totally defective because it instructed counsel or the jury or making any argument upon common knowledge or information" and that it "commanded the jury to disregard the arguments of learned counsel on propositions of law applicable to the facts because such an argument could not be directly based on the evidence." We do not think the construction which counsel for appellants have placed on the instruction is a fair and reasonable one. The

instruction simply tells the jury in effect that they must not be influenced by assertions or statements of counsel on either side of the case which are outside of the record. In other words, the statements or assertions of counsel in regard to the evidence must be confined to the facts proved in the case. The instruction left counsel free in their argument to draw any and all fair and legitimate inferences from the evidence which were warranted by the facts. The instruction does not deprive counsel "of the right of making any argument based upon common observation or experience." The argument of counsel could not be considered by the jury in any other way than in the light of "common observation or experience," as that is the only method by which the jury could reason. In other words, they would reason by analogy from the fair expectation that people will act as they have acted before in like circumstances, that is, as they customarily act. The question in the case is one of negligence. In determining this question the jury would compare the conduct shown by the evidence with customary conduct, that is to say, with conduct which would be expected from ordinarily reasonable men in similar circumstances; in other words, conduct which would be in accordance with common observation and experience.

Instructions containing similar parts to the part of the instruction complained of have been held not to be erroneous. North Chicago Street R. R. Co. v. Wellner, 206 Ill. 272; Szczeck v. Chicago City Ry. Co., 157 Ill. App. 150; Pennsylvania Co. v. Greso, 102 Ill. App. 252, 257.

For the reasons stated in the opinion the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Matchett, P.J., concurs.
McSurely, J., dissents.

258 - 28093

(3470)

JOE GOORMAN and CHARLES MANN,
Individually and as Copartners,
Doing Business as GOORMAN & MANN,
Appellee,

vs.

EMPORIUM CLOAK & SUIT CO.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

232 I.A. 312

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

In this action appellee, Goorman & Mann, brought suit against appellant, Emporium Cloak & Suit Company, to recover the difference between the purchase price and the market price of merchandise sold to appellant by appellee and resold in the market by appellee after the alleged refusal of appellant to accept and pay for the merchandise. Judgment was entered in favor of appellee for $1035.00.

The principal question in the case, which is one of fact, is whether appellee waited a reasonable time before making the re-sale. According to the undisputed facts appellant is a corporation engaged in the retail mercantile business and operates a chain of stores in different towns. Appellee is a copartnership which manufactures and sells wholesale women's garments. About September 10, 1921, appellant ordered dresses, suits and cloaks to the amount of $2922 for five of appellant's stores. The goods were to be shipped on September 15, 1921, in specified amounts to different stores of appellant. On September 16, 1921, appellee shipped goods which it had in stock amounting in value to $1773, and began work immediately on the remainder of the order. September 16, 1921, the same day that the goods in stock had been shipped by appellee, the buyer of appellant, Daniel A. Friesen, telegraphed appellee as follows: "Do not ship any dresses or coats for

Emporium or Fashion Stores until you hear from me." September 19, 1921, appellee telegraphed Friesem the following reply: "Wire received. Made partial shipment sixteenth. Holding balance for your letter." September 21, 1921, appellee wrote to Friesem as follows: "We wired you Monday the 19th upon receipt of telegram that we were holding your balance of order and that we would await your letter as per your telegram. Up to this writing our records show no receipt of having received a letter from you. We do not know how to proceed with the merchandise on order for you. This is all in work and will be complete, ready for shipment within the next few days. Each and every item was made up for you exactly as bought from your bona fide orders, placed in our sample room. We will thank you to advise by return mail whether or not to ship immediately or else we will be pleased to accommodate you and hold shipments for a few days more. We assure you of our appreciation of past favors and hope for a continuance of same." September 22, 1921, Friesem sent the following telegram to appellee: "We notified your Mr. Russek also house not to ship goods until notified no goods to be accepted until you hear from us." September 23, 1921, appellee telegraphed a reply to Friesem as follows: "Refuse to accept returns from your stores merchandise shipped exactly as bought from your bona fide order. Balance of orders ready for shipment, will hold few days more. Advise when to ship." At this time appellee had completed the rest of appellant's order, and was holding the goods ready to be shipped as soon as appellant should direct. September 27, 1921, Friesem wrote to appellee the following letter: "Your letter of the 21st handed to me. In reply wish to say that I wired you, and also notified your Mr. Russek not to ship any merchandise until you heard from me as the weather has been terribly warm and there has been no business. I absolutely will not accept any merchandise at any of our stores as I will be in

Beaverbrook or Frederick Ziegler would you lower your eyes." Bourassa ha, ha!!, squeezing telepathetic triumph the television screen. "Give up, giver. Take guilty children's treasures. Protecting following the poor lovers." Lambsbury ha, ha!!, squeezing every ounce of triumph in following: "Is what you doing for the good people of Saskatchewan that we were talking your welfare of either act that we really would your lives as our true interests. Or is this million our towards what we consider of having continued a larger than you. Is it not more you is pressed with the responsibility to govern for you, this is all to work and will by industry, study for economic which the most for here. Just not until that the time of the year Monday we bought this your home <u>long</u> time ago. Bought it and moving then. We will ignore you to arrive by saturday will neither or not it was immediately as date to work to planner to economics you are held responsible for a few days more. We leaving you at the supermarket or good family not high to a political or news." Lambsbury ha, ha!!, Friends and the Saturday Evening Gazette is consider the building your or. Because also house not to this which would realize we going to be answered which you been long ago." Bourassa ha, ha!!, suddenly telepathetic a study to friends as friends. Thanks to money we turns from your white nationalist policy which is longer than your <u>long</u> time ago. Believe of large study for which and held two more. Which than to this." In this time speaking had considered the year of Macdonald's under, not yet because the people early to be mistake or come to consider about closer. Bourassa ha, ha!!, suddenly where to consider the following Trudeau: "Your leaves of the last Bourassa so we. Is only time to our that I mean you, not day entitled over to. Because not to why our constitution until you finally that to be the another the least invisibly even the first has been be business. I unanimously will not answer any consequence as any of our answer as I will be to

New York in the next ten days and take this matter up with you in regard to shipment." September 30, 1921, appellee received the following telegram from Friesem: "Will be in New York City next week. Recall packages from Express Company and will take same up with you." After receiving that telegram appellee took the goods from the Express Company which appellant had returned, and on September 30, 1921, wrote the following letter to Friesem: "In reply to your letter of September 27, in which you ask us not to ship merchandise on account of warm weather, as you will not accept same for your stores, we wish to say we are ready and willing to follow your instructions as to the shipment of same. The merchandise was made up for you, cut for you, manufactured for you, and same was already sold to you. We were notified by the Express Company that some of the merchandise had already been returned. In order to minimize the possible loss to you we will take same from the Express Company and keep it in our place, subject to your order."

Friesem was in New York "around Thanksgiving," but he did not go to see appellee. Friesem testified that he was in New York only two days and that the matter "must have skipped" his mind. Friesem had an office in New York, at 276 Fifth avenue, with a man in charge. Appellant inquired for Friesem through Friesem's New York office about the time he said he would be in New York, but was unable to reach him. October 14, 1921, appellee wrote a letter to Friesem, addressed to 276 Fifth avenue, New York City. The letter is as follows: "We are indeed surprised that you have not been up to see us since you have been in the city. We trust, however, that we will see you within the course of the next day or two as the merchandise is here awaiting your instructions. We trust to see you soon."

On October 15 appellee again wrote Friesem at the same address as follows: "We expected to see you in our office

New York in the event you have not been asked to join the in search to Russell." December 20, 1973, concluding remarks the Pittsburgh Industrial Town Patrons: "Until he is one year old week. Small deposits from Tuesday morning you will also need to visit you." Upon realizing that Lakeview appeared that gives from the Eastern Seaboard which Christmas Eve protocol, and on Saturday, 20, 2007, Perry and Elizabeth Little in Lakeview "It would be quite helpful if Jacqueline 73, in which you can be one in this administration in memory of Mara Vasquez, so you will not another week for your stamps, so that it may be ready and willing to future gift instructions as to the whereabouts of Jane. The Jacqueline you talk to, the job, out for you, manufactured for you, and some may actually hold in jar. The need consistent by the Western Corporate Ownership and of the accomplishment and already made reminder. In order to determine the machine line to you as well take here from the Western Corporate Ownership and keep it in the clear, some just in your wallet."

Pilkemo was in the high "Annual Technical Study," but he did not in the Appalachian. Jacqueline Pilkemo that in Sam in Sam Cook only the Lady Jo Lad the Bailey "Most Sure Believer" life Adam. Pilkemo had an office in New York, at 473 Hill Avenue, which a man in Boston. Jacqueline Bailey for Pilkemo through Pittsburgh and Sam Cook Bailey be sent to Pilkemo's in the New York, but was unable to reach him. October 11, 1973, Jacqueline wrote a letter to Pilkemo, addressed to 473 Hill Avenue, New York City. The letter is as follows: "We were hoping Mara would you have not been in to see us since the new year began in Boston city. In fact, however, that we will see you around the middle of the month for us to be the administrator in Sam Bailey's office. In travel to see you soon."

In fact, in December Sam Bailey travelled at the was unknown to Pilkemo. "It occurred to me you in our office.

as per your promise during last week. However, you failed to come. No doubt you will be in to see us Monday, and not disappoint us any longer."

Appellee sold the goods on November 4, 1921. Goorman, a partner in the firm of appellee, testified that the price obtained was "above a fair market price" and that it was "about 60 per cent of the original invoice price." Goorman also testified that he made every effort to sell the goods; that he had several offers but the offers were lower than the price for which the goods were sold. Goorman also testified that the goods were "seasonable merchandise," that is, that "after it hangs on the racks for three weeks, or three weeks after it has been made up, it depreciates in value;" that after merchandise that has been made up on a special order is returned it becomes what is called a "job lot;" that "it has to be repressed, and as it has been in a box for a time, it is in bad shape."

Goorman testified that the season for the kind of merchandise in question would be over for the wholesaler and "jobber" by October 15; that for the retailer it "would last as long as the weather remained so that fall and heavy merchandise would be salable;" that the goods in question could have been "sold by popular-priced stores in November and December."

Witnesses testified in behalf of appellant that the dresses in question were salable at retail from September 1 to January 1 and the coats from October 1 to January or February; and that "the season generally slackens up about the week before Thanksgiving."

Counsel for appellant argue that appellee had no reason to assume that appellant had abandoned the merchandise and had defaulted on its contract; that the season for the sale of the goods had not closed and that there was ample time for the goods to have been sold by appellant. In this connection it must be

borne in mind that the season for the retailer and the wholesaler is not the same. The testimony of appellant's own witnesses is to the effect that the season for the wholesaler closes "about the week before Thanksgiving." The goods were sold by appellee on November 4. The intention of appellant not to carry out its contract and the reason therefor is indicated by the following letter from appellant to appellee dated October 3, 1921: "We received postal card from Express Company today advising us you had refused to accept package we had returned. The merchandise was received entirely too late and at present time we are heavily overstocked. We would appreciate it if you would accept the merchandise unless you care to do so kindly cancel any further orders you have for us."

Friesem testified that the letter was written without his authority, but the letter merely expresses directly the same intent of appellant to abandon the merchandise that is shown by the facts and circumstances in evidence. However, Friesem himself testified that he sent the coats back because the weather was warm and there was no demand for early purchases; that they had too many coats purchased; that the retail stores did sell merchandise, but that they were overstocked. It is true that Friesem testified that appellant expected to have the goods shipped again to appellant's stores, and that the return of the goods was not an effort to cancel the contract for the merchandise. But Friesem's failure to go to see appellee while he was in New York, after he had written and telegraphed that he would take the matter up with appellee when he reached New York, does not harmonize with his testimony. And his explanation that the matter musthave "slipped his mind" is wholly unsatisfactory. Counsel for appellant maintain that the fact that appellee addressed the letters to Friesem to his New York address instead of to Chicago, shows that appellee did not "make any bona fide attempt to get in touch with Friesem

or to ascertain why he did not call." We think that the fair inference from this fact is that appellee was anxious to reach Friesem without delay. Appellee was led to believe from Friesem's telegram and letter that Friesem would be in New York about the time appellee's letters were written. In addition to the letters appellee tried to reach Friesem through his office in New York. In the circumstances the burden was not so much upon appellee to find Friesem as it was upon Friesem to communicate with appellee. The merchandise was being held at Friesem's request, and subject to his directions, and he should have given appellee instructions without unnecessary delay. The season for the wholesaler was nearing a close and expeditious action was necessary. The wholesaler could not reasonably be expected to hold the merchandise throughout the entire time of the retail season.

After a careful consideration of the evidence we are of the opinion that the conduct of appellant was such as to induce appellee reasonably to believe that appellant did not intend to carry out its contract.

It is further contended by counsel for appellant that no notice of appellee's intention to resell the merchandise was given to appellant, and that the law of New York requires such notice. In a case, such as the one at bar, a resale may be made under the Personal Property Law of New York "where the buyer has been in default in the payment of the price an unreasonable time;" and "it is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer, but *** the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made." From the views that we have expressed, it follows that appellant was in default in payment of the price an unreasonable time before the resale was made; and that therefore no notice was

necessary. On the evidence it is probable that even if notice had been given, appellant's conduct would not have been different.

Counsel for appellant contend that "there is a variance between the allegations and the proofs." Appellant is not entitled to present the question of variance for review, as the alleged variance was not specifically pointed out on the trial. The record does not show that any objection was made to the evidence, as it was offered, on the ground of variance, or that any motion was made at the close of the evidence to exclude the evidence on that ground. Libby, McNeil & Libby v. Sherman, 146 Ill. 540, 549; Carney v. Marquette Coal Mining Company, 260 Ill., 220, 225; Thomas v. Chicago Embossing Company, 307 Ill., 134, 138, 139.

We have considered the objection, however, and we are of the opinion that there is no substantial variance. Counsel contend that the statement of claim is based on the right to recover "the loss upon the resale of goods alleged to have been made immediately upon a return of the merchandise shipped and a refusal to accept the balance," whereas, "the evidence clearly shows the return of the merchandise was accepted and the refusal to accept the balance waived, a modification of the contract was made, and the resale was based upon a failure to give shipping instructions under the modified contract." We do not agree with the reasoning of counsel. The ultimate ground of the right of the resale was not the failure of appellant to give appellee "shipping instructions," but it was the breach of the contract by appellant in defaulting for an unreasonable time in the payment of the price and the acceptance of the merchandise. The failure of appellant to "give shipping instructions" was only an evidentiary fact which was relevant to the question whether appellant intended to perform its contract.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

necessary. In the evidence it is questionable that what is noticed had been given, especially in contract would not have been different.

Counsel for appellant contend that "there is a vast gulf between the allegations and the proofs." Assuming it was sufficient to support the creation of estoppel for nonpay, as the alleged evidence was not specifically pointed out by the trial. The record does not show that any -itigation was made to the contrary. If it was offered, as the ground of rejection, it that any action was made at the close of the evidence to enable the court to take notice. Libby, McNeill & Libby v. Sullivan, 145 Ala. 640, 639; Mobile v. Dauphin Island Railroad Company, 70 Ala., 377, 385; Thomas v. Alabama Gold Mining Company, 147 Ala., 147, 149, 149.

To have considered the objection, "proof," and so its of the evidence that there is no substantial variance. Counsel contend that the statement of claim is based on the right to recover "the time when the events of which citizens in here been made intentionally upon a review of the constitutional rights, and a refusal to assent the validity," whereas, they argument thereby where the return of the machinery was accepted and the refusal to accept the balance valued, a modification of the contract was made, and the re-made was based upon a failure to give obtaining instructions under the modified contract." To do not agree with the reasoning of counsel. The citizens proved on the claim of the trouble was not the failure of contract to give appellee "obtaining instructions," but it was for breach of the contract by appellant in delivering for an unreasonable time in the payment of the price and the acceptance of the machinery. The failure to provide "give obtaining instructions" was only an attempted breach which was relevant to the question whether material breach is proofs its contract.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McClellan, C. J., and Dowdell, J., concur.

28149
314 - 28149

(347 Ia)

HATTIE BOUCEK,
Appellee,

vs.

FRANK BOUCEK,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit court of Cook County committing appellant, Frank Boucek, to jail for failure to pay appellee, Hattie Boucek, his wife, money alleged to be due her under a decree for separate maintenance granted to the wife. On appeal to this court by appellant the decree for separate maintenance was reversed on the ground that the decree contained no finding that appellee was living separate and apart from appellant without her fault. (Case No. 27896, Opinion filed in this court February 19, 1923, not yet reported). The effect of the reversal of the decree was to vacate it and set it aside. (Ure v. Ure, 223 Ill. 454.)

The order committing appellant to jail being dependent upon the decree is therefore void and is reversed. (Madson v. Clark, 166 Ill. App. 441).

REVERSED.

Matchett, P. J., and McSurely, J., concur.

315 - 28150

(34720)

HATTIE BOUCEK, Appellee,	)	APPEAL FROM CIRCUIT COURT OF
vs.	)	COOK COUNTY.
FRANK BOUCEK, Appellant.	)	

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit court of Cook County committing appellant, Frank Boucek, to jail for failure to pay appellee, Hattie Boucek, his wife, money alleged to be due her under a decree for separate maintenance granted to the wife. On appeal to this court by appellant the decree for separate maintenance was reversed on the ground that the decree contained no finding that appellee was living separate and apart from appellant without her fault. (Case No. 27396. Opinion filed in this court February 19, 1923, not yet reported). The effect of the reversal of the decree was to vacate it and set it aside. (Ure v. Ure, 223 Ill., 464).

The order committing appellant to jail being dependent upon the decree is therefore void and is reversed. (Madson v. Clark, 166 Ill. App., 441.)

REVERSED.

Matchett, P. J., and McSurely, J., concur.

355 - 28190

(34734)

CHARLES G. THELEEN,
Appellee,

vs.

MARK F. MADDEN and MICHAEL S. MADDEN,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

232 I.A. 31

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Mark F. and Michael S. Madden, appellants, from a judgment of the Municipal court of Chicago in favor of Charles G. Theleen, appellee, for $475.50.

The action was brought by appellee to recover $475.50 alleged to have been unlawfully withheld by appellants in a real estate transaction in which appellants acted as brokers for appellee. The principal question in the case relates to an issue of fact as to whether appellee agreed to pay appellants a commission of five per cent on $15 an acre offered for the farm of appellee, and, in addition, one-half of any amount above $15 an acre which appellants might obtain. There is a direct conflict of the testimony. Three witnesses testified for appellants. The only testimony for appellee was that of himself. The jury believed the testimony of appellee and rejected that of the other witnesses.

In 1909 or 1910 appellee saw an advertisement of appellants saying that they "could exchange income property for farms." Appellee had a farm in Virginia which he wanted to exchange for property in Chicago. He called on appellants at their office, directed their attention to the advertisement, employed them to arrange for the exchange of his property, and agreed on a commission of five per cent. Appellee testified that appellants asked for the exclusive right to handle the

CHARLES G. TRESKON,
Appellee.

vs.

MARC I. ROTHKE and WILLIAM
H. WAGNER,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCHAFER DELIVERED THE OPINION OF THE COURT:

This is an appeal by Marc I. and Eileen H. Rothke, appellants, from a judgment of the municipal court of Chicago in favor of Charles G. Treskon, appellee, for $475.00.

The matter was brought by complaint in replevin $475.00 alleged to have been unlawfully withheld by appellants in a real estate transaction in which appellant sought to purchase the premises. The principal question in this case involves the issue of fact as to whether appellee agreed to pay appellants a commission of five per cent in the amount offered for the sale of premises, and, if affirmed, whether or not payment where the sale was prior contingent upon obtaining. There is a direct conflict of the testimony. There wilnesses testified for appellants. The only testimony for appellee was that of himself. The jury believed the testimony of appellee and returned that as the sole witness.

In lieu of this appellant was in agreement of the relative merits that they "would encourage income property for Tyson." Appellee was a farm in Illinois which he wanted to exchange for property in Chicago. He acted on behalf of their office, directed their attention to the advertisement, analyzed them at account for the exchange of his property, and agreed on a commission of five per cent. Appellee testified that appellants asked for the exchange plan so he helped the

property, but that he refused, saying that he wanted "the privilege to sell it" himself if he could. Appellants deny that appellee made any such statement. Appellee, however, did in fact conduct negotiations himself for the sale of the property. For about 9 or 10 years the agency for the property remained with appellants, but no sale or exchange was made. Several deals were proposed by appellants but for various reasons none was ever consummated. August 25, 1919, appellee received a letter from a prospective purchaser named Guthrie, stating that he would like to buy appellee's farm if he could get it for a reasonable price. There was some correspondence between appellee and Guthrie. Appellee stated that he would not take less than $15 an acre. Guthrie wrote a letter agreeing to take the farm at $15 an acre, enclosing $100 to "bind the bargain." About the latter part of November or the first of December, 1919, appellee went to appellants, met Edward Madden and, according to appellee's testimony, said to him: "I sold my farm in Virginia for $15 an acre, got $100 to bind the bargain." Appellants deny that he said "I sold my farm." They admit, though, that in his letter Guthrie accepted appellee's offer, enclosed a check for $100, and asked appellee to send on the abstract and have a survey made. Appellee testified that Michael Madden, who was present at the conversation with Edward Madden, said to appellee: "You ought to have $500. If you let us handle that deal we can get you more money and get some money for ourselves. We will take half of what we can get over $15 per acre and do the work, and we will send that check back." Appellee testified that he said: "You are agreeable to take one-half of what you get over $15 per acre and give me the other half?" and that Michael Madden said: "Yes, that is what I mean and do all the work and correspondence and everything and give you half of what we get over $15." Appellee testified that he gave Michael Madden the check and said, "Go

property, but that he refused, saying that he would "give privilege to such if" himself if he would. Negotiations dragged through months and years afterward. Nothing, however, did in fact conduct negotiations himself for the sale of the property. For about 2 or 10 years the agents for the property, Thomsons with Annellists, had an sale or exclusive rent made. Several times prepared by monitiate but for various reasons some one ever accepted. August 10, 1917, Annellis received a letter from a prospective purchaser named Smiths, stating that he would like to buy Annellis's, then if he could get it for a reasonable price. There was some correspondence between Annellis and Smiths. Annellis stated that he would not take less than $15 an acre. Smiths wrote a letter accepting to take the land at $15 an acre, explaining that he "had the money." Upon the arrival part of November at the first of December, 1917, Annellis came to Appalachia, met Smiths and Smiths and, according to Annellis's testimony, said to him: "I hold my land in Georgia for $15 an acre, not $100 to plant the bungalow." Annellis says that he said "I sold my farm." They talked, though, that in his letter Smiths somewhat explained after, mentioned a "sale for land," and stated Annellis to send on the abstract and have it attorney made. Annellis testified that Edward Smiths, the son present at the conversation with Thomas Smiths, said to Annellis: "You ought to have $100. If you let us handle this deal we can get you more money and get some money for ourselves. We will take half of what we can get over $15 per acre and we will send you the check back." Annellis testified that he said: "You are currently to take one-half of what you get over $15 per acre and give me $100?" and that Edward Smiths replied: "Yes, that is what I mean and is all the same and arrangements and everything and give half of what we get over $15." Annellis testified that he then directed Smiths the check and said, "Go ahead and do the best you can."

ahead and send it back." The testimony of appellee as to what followed is not clear. According to the abstract, he testified as follows:

"A couple of weeks after that I saw him again in his office; told me he had not received any answer from Guthrie. I had the other letters from Crafton, and told him he could answer them, take them up. At the last interview I spoke of I gave those letters to Madden Brothers. This letter of December 15, 1919, I got from Crafton at that time. This is one of the last I showed to Michael Madden. Also gave him plaintiff's exhibit 4 and 8 at that time, probably two or three days after I wrote them; told him he could take up the correspondence with Crafton; said he would. When I showed him the Crafton letter he said, 'This is new to me, for you to get so many correspondents, there must be something booming down there. I will take this correspondence from Crafton and see what I can do with him.'" The "Crafton" letters referred to were letters from a prospective purchaser named Crafton, who had first written to appellee about the same time that Guthrie had written. In one of Crafton's letters he offered appellee $15 an acre for appellee's farm. Appellee testified that he "turned over to Madden Brothers" the letters from Guthrie and Crafton about December 1, 1919, the same day that he, appellee, got the letter from Guthrie containing the check for $100. Michael Madden testified that appellee did not give them the letter from Crafton in which $15 an acre was offered until the day after appellee gave them the Guthrie letter. Appellants finally succeeded in getting Crafton to offer $18 an acre for the farm. Appellee accepted this offer and the farm was sold to Crafton. The testimony in behalf of the appellants on the controverted questions is directly contradictory of appellee.

[illegible] and was it true." The sentiment of speaking as to that followed in our views. Answering to the sentiment, he continued as follows:

"A couple of weeks after that I was [illegible] to his office, but as he had not received any answer from Gaston. I had the other letters from Gaston, and tell him he would answer them, late than ever. At the last interview I spoke of I gave these letters to Gaston Brotteau. This letter of December 17, 1919, I got from Gaston at that time. This is one of the last I showed to Richard Dalton. Mr. Cora Bim [illegible]'s [illegible] I said I at that time, probably two or three days after I wrote them; his one so much like as the correspondence with Gaston; said he would. Then I showed him the Gaston letters he said, "This is new to me, for you to get in touch not [illegible]. Give most to something beneath that there. I will look this [illegible] produces from Gaston and see what I can do with him." The "Gaston" letters referred to were letters from a revolutionary purposes about Gaston, who had first written to inquiring about the man that [illegible] had written. In the of Gaston's letters he offered [illegible] $15 to save for [illegible]'s time. Another letter that he "turned over to Dalton [illegible] the letters from [illegible] and Gaston about December 3, 1919, the same day that in, [illegible], put the letter from Gaston [illegible] the [illegible] Gaston [illegible] that [illegible] did not give them the letter from Gaston to [illegible] [illegible] to save [illegible] [illegible] the day after [illegible] that the [illegible] letter. Ultimately [illegible] in [illegible] [illegible] as after [illegible] to save for the [illegible]. [illegible] [illegible] and the [illegible] was [illegible] to [illegible]. The [illegible] [illegible] of the [illegible] on the [illegible] [illegible] is [illegible] [illegible] of [illegible].

Three witnesses testified for appellants - Margaret Conley, the bookkeeper, and Michael and Mark Madden. Their testimony is substantially the same. According to Michael Madden, appellee came to the office of Madden Brothers about December 16 or 17, 1919, with the letter of Guthrie in which a check for $100 was enclosed. Appellee said: "I have a check for $100 on my farm. I have got to pay a commission any way and you had better handle it. You can handle it better than I can." Appellee handed him the letter. Michael Madden said: "I think you are foolish in accepting a check so small, he might tie up your land for six months, and if he don't make the payment good it will cost you three or four or five hundred dollars to clear the title." Appellee replied: "This is yours now, you go on and handle it." Michael Madden further testified that he wrote a letter to Guthrie, which appellee read, saying that $100 was insufficient and asking for a check for $400 more; that that evening after the letter was mailed Michael Madden, in the presence of appellee and Mark Madden, said to appellee: "Now you are willing to sell this land for $15 an acre and pay us a commission. You are selling for too little. We can get more. I will make a deal with you right now. You pay us 5 per cent on $15 an acre and anything we get above that we will divide. If we get $16 an acre we will split it fifty cents an acre. If we get $18 an acre or $20, we will divide whatever we get." According to Michael Madden appellee said: "I am willing on one condition, that I don't want to lose the sale at $15 an acre." Michael Madden said: "We will hold the check. We can dicker along with Guthrie for some time and not lose this sale, and possibly in the meantime we will get somebody to pay more." Michael Madden testified that the following day appellee gave appellants the letter from Crafton offering $15 an acre, and also a letter from Guthrie in which Guthrie objected to the title of appellee. Michael Madden testified that when he saw the letter from Guthrie he said to appellee: "Now there may be something to that.

Three strikers travelling for workhouse - Gangmaster cruelly, the bombshoppe, and Alicean and Ivers Maidens. Their tailoring is exhaustingly the same. According to Michael Barnes, spokesman been to the office of Justice Employers about Saturday 12 to 17, 2010, with the letter of Justice in which a wheel for 2000 was mentioned. Spokesman said: "I have a place for them on my farm. I know my is people's circumstances are my but you had better tackle it. You can handle it better than I can." Spokesman further the letter.

Michael Barnes said: "I think the Prelim is already a wheel so small, he gives the no power land for his workers, and if he don't make the payment good it will cost you three or four hundred dollars to move the title." Spokesman said: "This is your day, you go on and handle it." Michael Barnes further stated that had an error a letter to workers, which spokesman read, saying that Mr. Michael was indifferent and waiting for a chance for 1910 here; that should wheeling after the letter was sent Michael Barnes, in the presence of spokesman and foreman, said to spokesman: "Now you are striking to call this land for 2000 or more and go to a commission. You are selling for one dollar. We can get more. I will take a land with the price right now. Tell you as I put on 2000 or more and supposing we get more than we will strike. If we get 2000 or more we will hold it if they make us work. If we get 2000 or more or 2000, we will strike whenever we get." Spokesman to Michael Barnes spokesman said: "I am giving on our conditions that I don't want to lose the work at 2000 or more." Michael Barnes said: "We will hold the report. If you don't agree with Barnes for some time and not lose this work, and possibly in the meantime we will get something at 2000 more." Michael Barnes testified that the initiative day spokesman with participate the letter from Barnes before getting 2000 or more, not also a letter from Gutchie in which Gutchie objected to the strike or workers. Michael Barnes testified that when he was the letter from Gutchie he said to spokesman: "Now there was no complaint.

It may help us. It will give us a chance to work on some of the others and prolong the time to give Guthrie an authentic answer as to his $15." Michael Madden then wrote to Crafton and to Guthrie. In the letter to Crafton he proposed either $20 or $22 an acre. In the letter to Guthrie he wrote that inasmuch as appellee's title was "no good," appellee had authorized appellants to withdrawn the property from the market. The Guthrie check for $100 was returned. Crafton agreed to pay $18 an acre and appellee sold the farm to him at that price.

On the testimony as it now stands, appellants' contention that appellee agreed to pay both a commission of five per cent and one-half of the amount obtained over $15 an acre seems improbable. The matter is explained by appellants in this way: About seven years previously, namely, September 13, 1912, appellants had procured a prospective purchaser for appellee named Schou, and a written contract for exchange of properties between appelleeand Schou was entered into. The exchange was not consummated, but appellants say that they told appellee that they had earned their commissions not only from him but from Schou; that they also told appellee that Schou was threatening to sue appellee because of misrepresentations that appellee had made; that thereupon appellee asked appellants to "help him out" of the difficulty, saying, "If you will help me out of this, when this farm is sold I will pay you a commission on it, I don't care who sells it." In his testimony appellee remembered the Schou transaction but did not recollect signing a written contract. He denies that he said he would pay a commission on the farm no matter who sold it. On probabilities this would seem to be true. There is no apparent reason why appellants would relinquish a commission which they claimed to have earned, and take a chance on receiving compensation for their work from some possible future sale. Moreover, on June 2,

1913, a similar transaction had been negotiated by appellants between appellee and a prospective purchaser named McComber, and apparently no claim of commissions was made by appellants for their services in this matter and no offer by appellee was made to pay any commissions. There is another improbable circumstance in connection with the contention that in the Schou matter appellee agreed to pay a commission on any future sale, and it is this: In the negotiations regarding the Guthrie and Crafton transactions the Schou matter was not mentioned in terms by anybody. Mark Madden testified that appellants had frequently referred to appellee's promise to pay a commission "by reason of" the Schou "deal being abandoned." But when compensation was agreed on in the Crafton deal neither Mark nor Michael Madden referred to the Schou deal. According to the testimony of appellants, appellee seems to have been the one who first stated that he had to pay "a commission any way," but it is not contended by appellants that he mentioned that the commission related to the Schou transaction. That transaction had occurred about seven years previous, and it would seem probable that if it was to form the basis of appellee's agreement to pay a commission in addition to other compensation, either Mark or Michael Madden or appellee himself would have referred to it by name. Moreover, Michael Madden's testimony in regard to the Guthrie and the Crafton matters does not harmonize with the theory that appellee was under an obligation arising out of the Schou deal to pay a commission. Michael Madden testified in connection with the Guthrie and the Crafton transactions as follows: "I will make a deal with you right now. You pay us five per cent on $15 an acre and anything we get above that we will divide." The probable thing for him to have said would be something to this effect: "You already owe us a commission in connection with the Schou deal. Will you agree also to divide all that we may get over

1919, a similar conversation had been conducted by correspondence between Wodehouse and a prospective curtain-raiser behind Aldwych, and apparently no mention of commissions was made by Wodehouse for their nervious in film matter and he after by insisting was made to pay any commissions. There is another interesting circumstance in connection with the reversion that in the letter noting approved to pay a commission on any future work, and it is this: In the negotiations regarding the outside and Overton transactions the Yahoo matter was not mentioned in terms by anybody. Such Dudley initiated that negotiations and frequently referred to Wodehouse's promise to pay a commission "for reason of the Aldwych 'Just Jolly' observance." Not even commission was agreed on in the Overton deal but there was no mention referred to the Yahoo deal. According to the evidence of negotiation, Wodehouse seems to have been the not very first issued that he had to pay "a commission not very," but it is not contested by Wodehouse that he realized that the commission related to the Jolly observation. The transaction had occurred about seven years previous, and it would seem probable that if it was to have the benefit of Wodehouse's services, it is a commission in addition to other inconvenience, either Jack or Edward Dudley or Wodehouse himself would have referred to it by name. In fact, Edward Dudley's testimony in regard to the dealing was the weakest motive does not harmonize with the theory that Wodehouse was under an obligation arising out of the Yahoo deal to pay a commission. Edward Dudley testified in connection with the Overton and the Overton transactions as follows: "I will make a deal with you right now. Let me say we have not got to make anything, we are above that we will divide." The previous talks for his to have said would be something to this effect: "You already owe me a commission in connection with the Yahoo deal. Till you have also to divide all that we may get over

$15 an acre?" Apparently, however, Michael Madden was proposing an entirely new agreement without reference to any past agreement relating to the Schou transaction.

There is other evidencein the case relating to a statement or bill which appellants rendered to appellee for their services in negotiating the Crafton sale. We are unable to tell from the brief of counsel for appellants what position they desire to take in this respect. In the affidavit of merits filed by appellants it is alleged as follows: "that the claim here made was compromised and settled by Mark F. and Michael S. Madden with plaintiff; that an agreement was reached between the parties as to the compensation to which defendants were entitled from the plaintiff and payment was made to and accepted by Madden Brothers in full accord and satisfaction of the controversy set forth in the statement of claim." Nowhere in the brief of counsel for appellants do they specifically discuss the question of "compromise;" and the question of "accord and satisfaction" is only referred to, not argued, in connection with appellants' contention that the trial court "refused to charge the jury on appellants' theory of the case." No decisions are cited in regard to "accord and satisfaction." Counsel for appellants discuss at some length the evidence in question, but as far as we are able to perceive they do not state or even suggest that the evidence constitutes, as a matter of law, a "compromise" or an "accord and satisfaction." The evidence is discussed by counsel for appellants under the general heading that the "Verdict and judgment are against the manifest weight of the evidence and should be reversed with a finding of fact." In view of this attitude of counsel it would seem that the questions of "compromise" and "accord and satisfaction" are not relied on as defenses in bar of plaintiff's action. We have, however, examined the evidence and are of the opinion that the elements

fit on actor." Interestingly, however, Tilghman limited the concerning an entirely new arrangement without reference to our own agreement relative to the Indian transportation.

There is also evidence that the case relating to a statement or bill which specifically mentioned to specifies that their services in negotiating with Englishmen also. To one minute to fall from the belief of economic for negotiating with English they desire to take to their revenue. In the affidavit of Morris filed by Morris[illegible] it is difficult as follows: "that the Indian have been the [illegible] and action by Lewis F. and Clarence V. Bailey with plaintiff; that an agreement was reached between the parties as to the compensation to Tilghman which [illegible] from the plaintiff and proceed was made to and accepted by Bailey Brothers in full [illegible] and satisfaction of the [illegible] set forth in the statement of claim." [illegible] in the [illegible] for appellants to [illegible] effectively discuss the question of "agreement;" and the question of "[illegible] and satisfaction" is only pertinent to, not [illegible], the contention [illegible] that the trial court "refused to charge the jury on appellants' theory of the case." In addition we [illegible] to regard to "[illegible] and satisfaction." Counsel for appellants [illegible] of [illegible] the evidence is [illegible], for so far as we [illegible] to [illegible] they do not [illegible] or even suggest that the evidence [illegible], as a matter of law, a "compromise" or a "[illegible] and satisfaction." The evidence is [illegible] by counsel for appellants [illegible] the general [illegible] that the "[illegible] and [illegible] are [illegible] the [illegible] weight of the evidence and should be [illegible] with a finding of fact." In view of this attitude of counsel "a trial judge [illegible] the [illegible] of "compromise" and "[illegible] and satisfaction" are not [illegible] as [illegible] in her of plaintiff's [illegible]. In [illegible], however, [illegible] the evidence was [illegible] of the [illegible] upon the [illegible]

necessary to constitute a "compromise" or an "accord and satisfaction" are lacking. The substance of the evidence in this respect is as follows: Appellee testified that after the mortgages and notes in regard to the Crafton sale had been shown to him he asked Michael Madden where the check of Crafton was, and that Michael Madden said: "I got that. When they settle it I will give you our check to square the balance." Appellee testified further that Michael Madden showed him the Crafton check but that he "held it in his hand and showed what the check contained;" that he, appellee, "did not look at the check at all." Appellee testified that Michael Madden went out of the office taking the check with him, and that he, appellee, never had the check in his possession; that Michael Madden came back and told the bookkeeper to make out the bill; that it was made out and presented to appellee and appellee said: "What do you mean by this? That is the commission on Thelen's sale $475, my sale, and I consider this highway robbery;" that Michael Madden said: "This is a cust mary deal;" that he, appellee, replied: "You did not sell the land and are not entitled to a commission;" that Michael Madden got mad and kept the check; that after twenty minutes he, appellee, said: "I will sign it under protest. I am not satisfied with the deal." Mark Madden was not present on this occasion. Michael Madden testified that appellee picked up the check, read it and laid it down on the desk; that he, Madden, went out of that office; that appellee remained. and that when he, Madden, returned appellee was sitting at the desk and that the check was still on the desk; that he, Madden, told the bookkeeper to make out appellee's statement; that she made it out incorrectly and that when it was presented to appellee he said: "You are making a mistake here. You are charging me commission on the $18 an acre instead

of $15;" that the statement was corrected; that appellee took it and said it was "all right," endorsed the Crafton check and handed the statement to the bookkeeper, who marked it "Paid;" that appellee wanted him, Madden, to sign the receipt and that he did so. Appellants' bookkeeper testified that Michael Madden directed her to make out a check for appellee for the difference between the Crafton check and the amount of appellants' statement; that she made it out and that Michael Madden handed it to appellee. This check, signed by "Madden Bros." and payable to appellee, is endorsed by appellee. Michael Madden testified that at this time appellee made no objection "to the amount of the bill" which appellants rendered, and did not say that he was "signing the check under protest;" that two or three weeks later appellee returned, got some papers relating to the Crafton transaction, but made no objection to the statement that had been rendered; that he first objected in the latter part of August, 1920, and that the statement was made out on May 3, 1920; that at this time appellee said: "Mike, I never signed any agreement to pay you one-half of the three dollars an acre;" that he, Madden, said: "What difference does it make?"; that appellee said: "As long as I did not sign it you could not legally collect it."

It is obvious that neither the foregoing testimony of appellee nor that of appellants is sufficient on which to base the defense of a "compromise" or an "accord and satisfaction." An essential element in both a "compromise" and an "accord and satisfaction" is a disputed claim; and this element is wholly lacking on the evidence. "An 'accord' is an agreement whereby one of the parties undertakes to give or perform, and the other to accept in satisfaction of a claim liquidated or in dispute and arising either from contract or from tort, something other

of Gil;" that the statement was misleading; that appellee took it and said it was "a start," motivated the Grafton group and leaded the statement to the newspaper, who quoted it "Gil;" that appellee wanted him, Carter, to make the report and that he did.

Appellants' contention that Gil Grant failed to make a demand for publication for the difference between the Grafton group and the remnant of appellants' stockholders, that she made it out and that Grant taken another to be appellee. This court, aligned by "Gaston step," not personally to appellee, is unshaken by opposition. Assumed for argument that at this time appellee made no objection "to the amount of the bill" which appellants rendered, and it is not sure that he was "taking the check under protest" that he or there made later specific requests, not even answer requests to the Grafton transaction, but made no objection to the statement that had been made; that he first objected to the latter part of August, 1970, and that the statement was made not on Nov 3, 1970; that at this time appellee said: "Fine, I never signed any agreement to buy you out-half of the Corre Tailors or were;" that he, Gaston, said: "What difference does it make?"; that appellee said: "As long as I did not sign it you could not legally enforce it."

It is evident that neither the "agreement" nor the "amount of appellee for that of appellants is sufficient to which to base the defense of a "mutualize" or an "accord and satisfaction." An essential element is both a "compromise" and an "accord and satisfaction" is a disputed claim; and this element is totally lacking in the evidence. "An 'accord' is an agreement through one of the parties undertaking to give or perform, and the other to accept in satisfaction of a claim liquidated or in dispute and satisfying either from contract or from tort, something other

than or different from what he is, or considers himself, entitled to; and 'satisfaction' is the execution of such agreement." 1 Cyc. 307. There is no evidence of a settlement of a dispute between the parties in the case at bar; and assuming that appellee relinquished part of his claim, there is no evidence that he received any benefit or consideration for so doing. Canton Union Coal Co. v. Parlin & Orendorff Co., 117 Ill. App. 622, 624; Hayes et al. v. Massachusetts Life Ins. Co., 125 Ill. 626, 638, 639.

According to the evidence, appellants merely handed their statement or bill for their services to appellee. There had been no dispute as to the amount of the bill previous to that. In fact the specific amount of the bill had never been mentioned. In handing appellee their bill appellants were not endeavoring to settle a dispute, or to offer in satisfaction of a disputed claim an amount different from what appellee considered himself entitled to. According to appellee's testimony a dispute did not arise until after appellee saw the statement or bill; and instead of compromising the dispute by entering into an "accord and satisfaction" appellee protested against settling on the terms proposed. On the testimony of appellants there never was a dispute, either before or after the rendering of the bill by appellants to appellee. According to appellants' testimony appellee made no objection to the amount of the bill, but on the contrary said it was "all right," and accepte

d and endorsed appellants' check for the difference between the Crafton check and the amount deducted by appellants as compensation for their services.

The debatable question is whether an "account stated" may be implied from the evidence. There is a recognized distinction between an "account stated" and "an accord and satisfaction." Roblee v. Barsa, 26 N. Y. Supp. 461. Appellants have not pleaded

than or different from what he is, or conceive himself, notified by; and 'satisfaction' is the exercise of such authority." 1 Ch. 207. There is no evidence of a satisfaction of a already interest the parties in the case at bar; and regarding that application impaired part of his claim, there is no evidence that is thereby any benefit or consideration for so doing. Lorens Dalin (Ind. Co. v. Dunlop & Crawford Co., 147 Ill. App. 287, 291, aff. 241 Ill. v. Dunlop & Crawford Co., 147 Ill. App. 287, 291, aff.

According to the evidence, creditors usually signed their statement of bill for their services to novelle. There has been no dispute as to the amount of the bill previous to that. In fact the novelle amount of the bill had never been mentioned. In handing novelle their bill novelle were not interested in making a dispute, or in after in satisfaction of a bill which they an amount different from that novelle additional bill. to. According to novelle's testimony a bill was not given until after novelle saw the statement of bill; and further at negotiating the dispute by entering into an "amount and satisfaction" novelle protested against novelle on the ground. On the testimony of novelle there never was a dispute, either before or after the rendering of the bill by novelle to novelle. According to novelle' testimony novelle made no objection to the amount of the bill, but on the contrary said it was "all right," and accepts.

A and mistake novelle' claim for the difference between the trading price and the amount indicated by novelle to novelle. novelle for their services.

The indefinite question is whether an "amount stated" may be implied from the evidence. There is a recognized distinction between an "account stated" and "a mutual and satisfaction." Pahlke v. Kern, 24 N. Y. Supp. 48. Novelle's case is stated

an "account stated." According to the rules of pleading and practice in the Municipal court, the affidavit of merits must specify the nature of the defense. An "account stated" is an affirmative defense and must be pleaded. Rizbel et al. v. Weil et al., 63 N. Y. Supp. 178. However, we have reviewed the evidence on this question, and although the testimony of appellee is not satisfactory, we do not feel inclined to disturb the verdict of the jury. We do not fully understand the force of appellee's testimony concerning the alleged attempt of Michael Madden to conceal the check from him. Assuming that the testimony of appellee is true in this respect, there is no apparent reason why, if he wished to see the check, he could not have requested Michael Madden to remove his hand. There is no evidence of duress. Furthermore, why did appellee endorse the Crafton check even under protest? There is no compelling necessity for him to endorse it at that particular time. As far as appellants' check is concerned, which was for the difference between the Crafton check and appellants' statement of the amount due to them from appellee, apparently there was no protest made by appellee when he endorsed it. It may be that the conduct of Michael Madden induced appellee to believe that if he did not endorse the Crafton check and appellants' check, Michael Madden would retain the Crafton check and refuse to make any accounting. The trial court, however, in the instruction numbered 5, instructed the jury in regard to the alleged settlement between appellee and appellant, and from the verdict of the jury it is evident that the jury did not believe that appellee's conduct was such as to bar his right to recover in this action. The question was one for the jury. Congress Construction Co. v. Interior Building Co., 86 Ill. App. 199, 201; Jenks v. Burr, 56 Ill. 450, 454; 1 Corpus Juris, sec.

an "amount stated." Assuming, in the guise of clarifying and prescribing in the traditional courts, the efficacity of merits and quantity and nature of the damages. An "amount stated" is or affirmative defense and must be pleaded. Gibson is ... v. Jack ... 87 F. 2d, 1st, 1936. However, we have reviewed the evidence in this proceeding, and against the testimony of appellee is not material. Here, we do not find that testimony is strong the verdict of the jury. We do not fully understand the type of appellee's testimony concerning the alleged attempt of Gibson Dobbs to unwind the after the. Assuming that the testimony of appellee is true in this respect, there is no apparent reason why, if he wished to see the other, he could not have approached Gibson Dobbs on behalf his home. There is no evidence of duress. Furthermore, why the appellee endorse the checks that even after priority? There is no compelling reason; for this is another of at that particular time. As far as substantial claim is concerned, which was for the difference between the Grafton stock and appellants' entitlement at the amount due it from appellee, necessarily issue was be produced made by appellee when he accepted it. It may be that the contract of Gibson Dobbs Dobbs supplies to believe that if he did not endorse the Grafton stock and appellants' check, Gibson Dobbs would retain the Grafton stock and refuse to make any accounting. The total owed, however, in the instruction numbered 3, instructed the jury in regard to the alleged set-off between appellee and appellant, and from the verdict of the jury it is evident that the jury did not believe that appellee's conduct was such as to bar his right to recover in this action. The verdicts are the jury. Commerce Commission Co. v. Atlantic Coastline Co., 84 Ga. App. 326, 341; Lewis v. Jones, 84 Ga. App. 1, 4; Ga. Power Co.

403, p. 729. There is sufficient evidence to support the verdict of the jury.

The testimony on all of the material issues of fact in the case is directly conflicting, and much of the testimony involves questions of veracity. It would be a hopeless task to attempt to reconcile the conflicting testimony on the written record alone. The rule is well settled that a verdict should not be set aside where the evidence is conflicting. In the case of the Illinois Central Railroad Company v. Gillis, 68 Ill. 317, the court said (p. 319): "If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." In Bradley v. Palmer, 193 Ill. 15, in citing among other cases the case of Illinois Central Railroad Company v. Gillis, supra, the court said (p. 89) that it "contains, perhaps as clear and apt a statement of the rule, if not more so, than any of them."

In the case of The People v. Boucher, 303 Ill. 375, the court said (pp. 380, 381): "It is the most important function of the jury and their peculiar province to determine the truth of the case, and the opportunity which they have of seeing and hearing the witnesses during their examination and cross-examination is clearly superior to that of a courtof review, which has before it only a record of the words used by the witnesses." Merely because there may be a doubt on the evidence or a doubt of the correctness of the verdict, does not justify the courtin disturbing the verdict of the jury. Illinois Central Railroad Company v. Cowles, 32 Ill. 116, 121; DeForrest v. Oder, 42 Ill. 500, 501.

We are of the opinion that the verdict of the jury is

203, p. 729. There is sufficient evidence to support the verdict of the jury.

The testimony on all of the material issues of fact in the case is directly contradicted, and each of the testimony involves questions of veracity. It would be a startling view to attempt to reconcile the contradictory evidence on the written record alone. The rule is well settled that a verdict should not be set aside where the evidence is conflicting. In the case of the Illinois Central Railroad Company v. Ashlock, 65 Ill. 487, the court said (p. 492): "If any rule of this court can be so well established as to be without question, it is that where the relation of witnesses is equal it, it is that a verdict will not be set aside however there is a contradiction of evidence, and the facts and circumstances, by a fair and reasonable interpretation, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." In Kendall v. Kidder, 104 Ill. 18, in citing many other cases the case of Illinois Central Railroad Company v. Ashlock, supra, the court said (p. 22) that it "establishes, between an clear and not a statement of the rule, it not more so, than any of them."

In the case of The People v. Sanford, 203 Ill. 379, the court said (p. 387, 388): "It is the sole province function of the jury and their peculiar province to determine the truth of the case, and the conscientiously which they base of judging and determining the witnesses during their examination and cross-examination is directly superior to that of a general rule, which has better it only a record of the words used by the witnesses." Merely because there may be a doubt as the evidence or a doubt of the correctness of the verdict, does not justify the courts disturbing the verdict of the jury. Illinois Central Railroad Company v. Cotton, 32 Ill. 118, 121; Dettrick v. Baker, 42 Ill. 500, 502.

We are of the opinion that the verdict of the jury is

manifestly against the weight of the evidence.

It is contended by counsel for appellants that the trial court erred in refusing to allow appellants to "explain the circumstances under which" the Schou contract and the McComber contract were executed. The contracts were admitted in evidence but counsel maintain that "in view of appellee's attitude that he had no recollection of signing these contracts, and his statement that he had never met Schou, and knew nothing of the circumstances surrounding the execution of these instruments," appellants should have been permitted "to prove the circumstances under which these contracts were executed by appellee." The contracts were admitted in evidence for the purpose of impeaching appellee's testimony that he did not recollect making or signing the contracts. As he did not testify to the circumstances in which the contracts were made, he could not be impeached by evidence showing the circumstances in which they werein fact made. In other words, he could not be impeached in respect of matters to which he did not testify. The admission in evidence of the contracts was all that was necessary. We are of the opinion the trial court ruled correctly.

It is further contended by counsel for appellants that the trial court erred in "limiting the evidentiary scope" of the Schou and McComber contracts "to the question of impeachment alone;" that the contracts constituted "a link in the chain of circumstances leading to appellee's abandonment of his alleged unexclusive agency, and his agreement to pay appellants a commission no matter who sold the property." The facts referred to by counsel were all brought out in the testimony for appellants. The contracts themselves added nothing new in this respect. The fact of their existence was all that was needed as a corrobative "link" or circumstance. In introducing the contracts in evidence to impeach appellee the fact of their existence was shown, and that fact could be considered by the jury as a corroborative cir-

manifestly qualifies the weight of the testimony.

It is contended by counsel for appellants that the trial court erred in refusing to allow witnesses to "explain the circumstances under which" the order monitors and the Dodgers monitors were opened. The contention was modified in argument but contained materials that "in view of appellant's attitude that he had no responsibility or claiming ownership, and his statement that he had never met Jones, and also nothing of the circumstances surrounding the execution of these instruments," evidence should have been admitted "in order to introduce under which these instruments were executed by appellant." The contention was utilized in evidence for the purpose of impeaching appellant's testimony that he did not remember meeting or talking to Jones. We do not see relevancy in the circumstances in which the monitors were made. Be that as it may, it cannot be impeached by evidence showing the circumstances in which they actually were made. In other words, by which not by impeaching in respect of matters as tended to lie in his liability. The admission in evidence of the monitors was all that the statement.

It is further contended by counsel for appellants that the trial court erred in "limiting the cross-examination" of the Jones was allowed concerning "the question of Jones' knowledge" that the monitors existed "in view of the question of Jones' knowledge" that the monitors existed "in view of the claim of the defendants Jones in respondent's statement of his claims in exclusive agency, and his agreement to pay commissions a commission on behalf the sale of property." The cross-examination by counsel were all through and in the testimony for appellants. The contention concerning cross-examination in this respect of their witnesses was all that was needed as a corroborative "link" or circumstance. In determining the sufficiency of evidence to support appellant the fact of their existence was seen, and that fact could be considered by the jury as a corroborative circ-

cumstance in connection with the question of the agreement relating to appellants' commission. In other words the jury could not find that the contracts were existent so far as impeachment was concerned, but were non-existent as a corroborative circumstance. The two purposes could not be separated, as the testimony of appellee which appellants sought to impeach and the contracts which were offered to impeach his testimony both had a bearing on the same question, namely, appellants' commission. We are of the opinion that there was no prejudicial error in the ruling of the trial court.

Counsel for appellants contend that the "trial court erred in instructing the jury that interest might be allowed for reasonable and vexatious delay, such instruction not being based on the evidence;" and they further contend that the instruction prejudiced "the minds of the jury on the general question of liability in this case." Interest was allowed by the jury but was remitted by appellee. We are of the opinion that the testimony of appellee is sufficient to justify the giving of the instruction. His theory of the case is that appellants wrongfully used their possession of the Crafton check to enable them to obtain a larger compensation than was agreed on; that they deceitfully induced appellee to endorse the check, then deposited it in their bank, deducted the amount of compensation which they claimed, and gave appellee their own check for the difference. Appellee testified that when the bill of appellants was handed to him and he saw that $475 had been charged as a commission for a sale which he, appellee, had made, he said: "What do you mean by this? That is the commission on Thelen's sale $475, my sale, and I consider this highway robbery." If appellee's testimony is accepted as true, the withholding of the commission of $475 was unreasonable and vexatious. Appellee was

evidence. In accordance with the doctrine of the statement relating to specimens' complaints. In other words the jury could not find that the specimens were selected so far as the statement was concerned, but were manufactured as a manufacture like (illegible). The two purposes could not be separated, as the testimony of witnesses with specimens sought to prove and the witnesses which were offered to prove by testimony both had a bearing on the case therefore, strictly, unofficial manslaughter. We are of the opinion that there was no prejudicial error in the ruling of the trial court.

Counsel for appellants contend that the trial court erred in instructing the jury that interest might be allowed for reasonable and reasonable delay, that interest not later based on the evidence; and (2) (illegible) that the instruction predicated "the claim of the jury on the general question of liability in this case." Interest can arrest by the jury but was resulted by statute. We are of the opinion that the testimony of witnesses is sufficient to justify the giving of the instruction. The theory of the case is that appellants wrongfully used their processes of the (illegible) to enable them to obtain a larger commission than was agreed on; that they (illegible) intended (illegible) to endorse the check, then inserted it in their name, deducted the amount of commission which they claimed, and gave appellee their own check for the difference. Appellee testified that when the bill of appellants was handed to him and he saw that $475 had been charged as a commission for a sale which he, appellee, had made, he said: "What do you mean by this? That is the commission on Dodson's sale $475, my sale, and I certainly like (illegible) robbery." If appellee's testimony is accepted as true, the withholding of the commission of $475 was unreasonable and vexatious. Appellee was

entitled to an instruction on his theory of the case.

In regard to the further contention of counsel for appellants that the instruction prejudiced the jury on the "general question of liability in the case," since we are of the opinion that the court correctly gave the instruction, it follows as a necessary consequence that we should hold that the instruction was not prejudicial. Furthermore, all of the instructions of the trial court were given orally and the objection by appellants to the giving of the instruction complained of was not specific. The objection was in the following general form: "To the giving of which oral instructions and each of them the defendants and each of them then and there duly excepted." According to the rules of the Municipal court, objections to the giving or refusing of oral instructions must be specific. Pecarero v. Halberg, 246 Ill. 95, 97; Northern Coal & Sup. Co. v. Mueller Bros. Fuel Co., 171 Ill. App. 342, 345.

It is further contended by counsel for appellants that the trial court erred in refusing to give two written instructions requested by appellants embodying appellants' theory of the case in regard to an "account stated" and to an "accord and satisfaction." At the close of the testimony appellants requested the court to give certain written instructions including the two in question. As the trial court instructed the jury orally after appellants' instructions had been handed up, the court did not commit an error in refusing to give the instructions. Morton v. Pusey, 237 Ill. 26, 34; Lepman v. Employers L. A. C., 170 Ill. App. 379, 382. Moreover, the instructions were not proper. The first was drawn on the theory of an "account stated." As we have previously explained, that defense was not set up in the affidavit of merits. The court did, however, instruct the jury in regard to the alleged settlement of the parties. The second presented the question of "compromise" and "accord and satisfaction." We

entitled to an instruction on his theory of the case.

In regard to the latter contention of counsel for appellants that the instructions prejudicial the jury on the "general question of liability in the case," since we are of the opinion that the court correctly gave the instructions, it follows as a necessary consequence that we should not find the instructions complained of prejudicial. Furthermore, all of the instructions of the trial court, taken given duly and the objection to appellants of the giving of the individual instructions is not tenable. The objection was in the following general terms: "To the giving of each oral instructions and each of them the defendants and each of them then and there duly excepted." Upon reading in the order of the Supreme Court, objections to the giving or refusing of trial instructions must be specific. Cantrell v. Mallory, 140 Ill. 95, 97; Bottomley and Co. v. Smith Exec. Chap. 19., 171 Ill. App. 340, 343.

It is further maintained by counsel for appellants that the trial court erred in refusing to give the written instructions requested by appellants concerning appellants' theory of the case in regard to an "unknown stranger" and to an "unknown and antagonistic." In the case of the Chicago Municipal Traction Co. v. City of Chicago, supra, the instructions included, the two in question. In the trial court instructed the jury exactly after appellants' instructions had been marked on, the court did not commit an error in refusing to give the instructions. Morton v. Thomas, 97 Ill. 69, 71; Lewis v. Delaware L. & W., 137 Ill. App. 371, 374. However, the instructions were not proper. The first was drawn on the theory of an "unknown stranger," in no more irrelevant evidence, but rather was not on in the affidavit of merits. The court did, however, instruct the jury in regard to the alleged statements of the parties. The second presented the question of "conspiracy" and "secret and antagonistic." By

have already indicated that there is no evidence to sustain such a contention.

For the reasons stated in the opinion the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

have already indicated that there is no evidence to justify such a condition.

For the reasons stated in the opinion the judgment of the trial court is affirmed.

DAUGHTRY, J., concur.

Bussey, P. J., and Gardner, J., dissent.

376 - 28211

(34744)

JOHN NEWMAN,
Appellee,

vs.

LAWRENCE ICE CREAM COMPANY,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF
COOK COUNTY.

232 I.A. 115

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Lawrence Ice Cream Company, appellant, from a judgment of the Superior court of Cook County for $3500 for injuries sustained by John Newman, appellee, in an accident alleged to have been caused by the negligence of appellant. This is the second time the case has been before this court. It was here the first time on a writ of error prosecuted by Newman, the present appellee, to reverse a judgment of nil capiat entered on an instructed verdict. This court reversed the judgment and remanded the case. There have been four jury trials of the case. On the first trial the jury returned a verdict for the plaintiff in the sum of $3000. The trial court set the verdict aside and granted a new trial. On the second trial the court directed the jury to find the defendant not guilty. The judgment on that verdict is the one that was reversed by this court on writ of error. The third trial resulted in a verdict in favor of the defendant. This verdict was set aside and a new trial allowed by the trial court. On the fourth trial the jury returned a verdict for the plaintiff in the sum of $3500. It is from this judgment that the present appeal is prosecuted.

The injury to appellee occurredin a collision between an automobile in which appellee was riding as a passenger and a motor truck belonging to appellant.

Counsel for appellant make no contention on the question

370 - 2021

John Evans,
Appellee,

vs.

Lawrence Ice Cream Company,
a Corporation,
Appellant.

Error from Superior Court of
Cook County.

2 8 2 P.

MR. JUSTICE FRANCIS ALTSCHULER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Lawrence Ice Cream Company, appellant, from a judgment of the Superior Court of Cook County for $2000 for injuries sustained by John Evans, appellee, in an accident alleged to have been caused by the negligence of appellant. This is the second time the case has come before this court. In the first trial the jury returned a verdict for the defendant, but the appellate court reversed the judgment and remanded the cause for a new trial. In the second trial the jury returned a verdict for the defendant and judgment was entered thereon. The judgment in the case now reviewed by this court was rendered on that verdict. The chief error complained of in reversing the judgment in the first trial was that the jury rendered a verdict for the defendant in the face of facts. The trial court had ordered a jury to find a new trial. In the second trial the court directed the jury to find for the defendant and judgment was entered on the verdict. The court directed a verdict for the defendant because the court was of the opinion that the plaintiff had failed to prove a case against the defendant. The question in this case was raised by the motion of the defendant for a new trial. The plaintiff in the second trial contended that the court had erred in directing a verdict for the defendant in the face of facts. It is from this judgment that the present appeal is prosecuted.

The plaintiff in the second trial contended that the defendant was negligent in the manner in which it had delivered the ice cream to the plaintiff's premises, and that the defendant had failed to prove a case against the defendant. It is from this judgment that the present appeal is prosecuted.

Because the evidence was by stipulation in the record

of negligence. The principal grounds on which they rely for a reversal relate to the sufficiency of the evidence on the question whether the driver of appellant's motor truck at the time of the accident was engaged in the business of appellant, or in his own personal business; and to rulings of the trial court in regard to the evidence.

Counsel for appellee contends that the question whether the motor truck of appellant was being used in the business of appellant at the time of the accident is concluded by the decision of this court on the writ of error reported in 220 Ill. App. 653. In the opinion the court said: "The main question upon the trial was whether the driver was at the time of the accident engaged in the business of his master, the defendant, or upon a private, personal errand of his own. *** We hold that the evidence presented a question of fact as to the operation of the truck which should have been left to the jury."

Counsel for appellant maintain that the decision of this court "simply held that there was evidence in the record tending to support the plaintiff's cause of action," and did not hold that the evidence was sufficient to sustain a verdict for the plaintiff. We are of the opinion that the contention of counsel for appellant is correct. We have therefore considered the evidence to determine its sufficiency, and have reached the conclusion that we should not disturb the verdict of the jury. The issue whether the driver of the motor truck was engaged in the business of appellant was directly presented to the jury by the following instruction: "You are instructed that if you believe from the evidence that at the time and place alleged in the plaintiff's declaration, defendant's automobile was being driven by Oscar Olon solely for some personal purpose or mission of his own and not in and about defendant's business, then the defendant is not liable for the injuries complained of, and this is true even though you should

of negligence. The testimony should be noted here only for a renewed entry in the cross-examination of the witness on the question whether the driver of appellant's motor signal on the time of the accident was subject to the exigency of operation, or in the use of proper business; and in judging of the total value of testimony in the evidence.

Counsel for appellee contends that the testimony showing the motor truck of appellee was found on the evidence of appellant of the time of the accident is contrary to, the decision of this court in the case of error reported in 130 Ill. App. 481. In the opinion the court said: "The main question with the jury was whether the driver was or was not the cause of the injuries complained of the business of the defendant, in such a manner, particularly upon account of his age. ... In this case the evidence presented a question of fact as to the exemption of the truck which should have been left to the jury."

Counsel for appellee contends that the decision of this court "clearly bars the evidence in the instant case in regard to the question the plaintiff's cause of action," and the ruling that the evidence was sufficient to sustain a verdict for the plaintiff. In one of the opinion into the consideration of counsel for appellee in support. In that decision considered the evidence to determine its sufficiency, the court reached the conclusion that we should not disturb the verdict of the jury. The issue whether the driver of the motor truck was engaged in the business of appellee was directly presented to the jury by the following instruction: "You are instructed that if you believe from the evidence that at the time and place alleged in the plaintiff's declaration, defendant's automobile was being driven by Jerry Lynn acting for some personal purpose or object of his own and not in the about defendant's business, then the defendant is not liable for the injuries complained of, and this is true, even though you should

believe from the evidence that said Oscar Glon was so using and driving the defendant's truck with the defendant's knowledge and consent."

It is evident from the fact that the jury returned a verdict in favor of appellee that they believed from the evidence that the driver of appellant's motor truck was engaged in the business of appellant at the time of the accident. In our opinion the verdict of the jury is not manifestly against the weight of the evidence.

Counsel for appellants contend that the trial court erred in permitting the witness Genatempo to answer the following question: "Q. Now directing your attention to the time that Glon came back to take the truck out again, did he say to you, 'I have got to take another load out?'" The witness answered that he did. Glon was the driver of the motor truck of appellant. The question was asked for the purpose of impeaching Glon. It related to the issue whether Glon was using the car for his own business or for appellant; and was not impeachment on an immaterial matter. The ruling of the trial court in our opinion is clearly not a ground for reversal.

Counsel for appellants further maintain that "the court erred in permitting counsel for plaintiff to attempt to impeach the witness Glon on many material details." The rulings objected to are not argued or in any way indicated beyond the statement of counsel which we have quoted.

Counsel for appellants again contend that "there are many instances, in addition to those already pointed out, in which the court erred in its rulings on admission of evidence." The "instances," however, are not specified or argued in any manner that we are able to discover.

believe from the evidence that said lease was in effect and driving the defendant's truck with the defendant's knowledge and consent.[1]

It is evident from the fact that the jury rendered a verdict in favor of appellee that they believed from the evidence that the driver of appellee's motor truck was acting in the business of appellee at the time of his accident. In reviewing the verdict of the jury in not manifestly against the weight of the evidence.

Counsel for appellee contend that the trial court erred in permitting the witness Hopkins to answer the hypothetical question: "A. Not directly your relation is the same that came back to this truck was going, did he go on to work, it was got to take another load out?" The witness answered she be did. Upon the driver of the motor truck at question. The question was asked for the purpose of impeaching him. It related to his home whether that was going the car belonged to for expeditiously and was not impeachment on an immaterial matter. The ruling of the trial court in the evidence is erroneous but is cured by reversal.

Counsel for appellee further argue that the court erred in permitting counsel for plaintiff to argue to impeach the witness also on such material matter.[1] The argument objected to was not argued or in any way intended beyond the statement of counsel which we have quoted.

Counsel for appellee again contend that "there was only testimony, in addition to those already mentioned, to which the court erred in its rulings on admissions of evidence." The "testimony," however, was not material or argued in any manner that we are able to discover.

It is further objected by counsel for appellants that in the examination of the witness Kuntz the "court refused to permit counsel for plaintiff to ask the witness whether or not on the trip in question they made any deliveries of ice cream." The witness was allowed to testify that they had no ice cream or ice cream cans on the truck. No deliveries of ice cream, therefore, could have been made, and it was unnecessary to allow the question to be answered.

Counsel for appellant maintains that the trial court erred in not permitting the witness Olin to testify that appellant's motor truck "had been taken out of service ten days or two weeks before the accident." That fact would not have been material unless it was further shown that the truck was still out of service at the time of the accident. Moreover, the witness Nurk testified that the "truck was not used for delivering" at the time of the accident; that it was "laid up about two weeks or ten days before" that time; that "it was taken out of service." The testimony of Olin would have been only cumulative.

Other objections are made by counsel for appellant relating to alleged erroneous rulings of the trial court in regard to impeaching questions asked by counsel for appellee, and to an offer by counsel for appellant to show that no deliveries of ice cream were made. We do not think that any of these objections constitute grounds for reversal.

Counsel for appellant further contend that in the examination of appellee it was intimated that appellant was "indemnified by an insurance company." Counsel cite authorities which hold in substance that any statement which shows that a defendant in a law suit is being protected from the judgment of damages by an insurance policy is error. The alleged statement was made by appellee in answer to the question, "How did you happen to be examined by Dr. Collier?" Appellee answered as

It is further alleged by Lucas, the prosecutrix, that in the kitchenette of the dining room the "male accused in words meaning her malicity to use the obscene epithet as her on the ground in question was made by Jonathan or the person." The witness was allowed to totally [illegible] the person on the same door as the [illegible]. On detailing it was crime, therefore, which here [illegible], but it was permissible to allow the question to be answered.

Counsel for appellant maintains that the trial court erred in not admitting the witness Olin to testify that Lucas's reputation was "very bad" in the community for truth and veracity. This was not material, it was held by the Court, and it was [illegible] the witness. Assuming, the witness has impeached the "truth and veracity" of the prosecutrix, it was [illegible] that time; that "it was known to be a lie." The testimony of Olin could have had only prejudicial.

Other objections are made by Counsel for appellant relating to alleged erroneous rulings of the trial court in the part of instructing evidence which by counsel for appellant, and in an effort by counsel for appellant to show that no relevance of the crime was made. We do not think any of these objections material to prejudice for reversal.

Counsel for appellant further argued that in the examination of witnesses it was permitted that witnesses were "intimidated by a Deputy Sheriff." Counsel also contended that in a case in which the jury is being instructed upon the judgment of Judge by an instructor jury is error. The subject matter was made by objection to answer to the question, "Do you impose to be examined by the Judge?" Counsel answered as

follows: "A man came to see me who said he was from the ice cream company or the insurance company and wanted me to go to Dr. Collier." Objection was made by counsel for appellant, and in ruling on the objection the court said: "I think what was said may be stricken out; that he went at the instance of this man without stating the conversation may stand provided you follow it up by showing it was at his instance."

Counsel for appellant then asked the court this question: "Your Honor will strike the answer?" The court replied: "The answer will be stricken." The witness (appellee) then made this statement: "I wouldn't be sure. It looked like Mr. Rose there." Mr. Rose was counsel for appellant.

It is apparent that no express statement was made to the jury that appellant was protected against loss by insurance. The only question to be determined is whether the jury would probably have inferred from the statement that appellant was protected from the payment of damages by being insured. We are of the opinion that such an inference is remote and conjectural, and that the jury would not have been warranted in drawing the conclusion that appellant was insured against loss. In the cases cited by counsel for appellant the information was clearly conveyed to the jury. Furthermore, in the present case the court ruled that the statement of appellee that the man said he was from the ice cream company or the insurance company should be stricken out. Counsel for appellant argue that the alleged error was not cured by the ruling of the court; and they cite cases in which the harmful effects of prejudicial remarks of counsel and improper evidence were held not to have been removed by rulings of the court sustaining objections to the remarks and the evidence. It will be found on an examination of these cases that the purport of the remarks and the evidence was plain and unmistakable, and not remotely inferable, as

Tolliver: "I was glad to see you who said to you from the lip grass
scented of the lowlands descending and saying we are to go in our business."
Tolliver was made by another for usefulness, and is noting on the
relation the other said: "I knew that was you, as we are strangers
met; that he was at the lowlands of life, the different meaning the
conversation may stand contrast the fortune is in by showing it
was at his leisure."

Tolliver for hospitality then asked the guest this
question: "How long will still be answer?" The guest replied:
"The answer will be eternal." The Tolliver continued then made
this statement: "I wouldn't be sure. It doesn't take us. Some
chance." Mr. Lowe was answer the question:

It is difficult that he replied statement was that it
the just that additional was existence equally has it inconsistent.
The main question is to determine it whether the just could gain
only data obtained from the treatment that question the answered
from his manner of keeping it fully unknown. In the of the main-
tain that was of difficulty it means not consistent, and that the
just could not give the question in knowing the inconsistent that
equalizes the logical logical sign. In the first sign by proved
the existence the logical sign of the equally. Therefore in the fact.
Therefore, in the argument that the first sense that the statement
of equality that the not fall in use from the are sense according
as the inconsistent sense should be written and. Further the ex-
planation sense that the signs sense are not equal in the result
of the unity; the fact is the sense in which the logical equality of
probability result of consist and logical existence that will not
be been been counted by values in the sense not equal existence
in the equality and the existence. It will be that in the or consider-
ation of these sense that the equality of the results and the ex-
tance was false and inconsistent, which the logical intensity, in

in the case at bar.

Counsel for appellant further argue in this connection that appellee stated that the man "looked like Mr. Rose" and that from this statement the jury would probably conclude that Mr. Rose represented the insurance company. Such an inference is not permissible in view of the fact that the appearance of Mr. Rose was on file as representing appellant, and the jury, during the course of the trial and the argument, must necessarily have become aware of the fact that he was appellant's counsel and was not representing an insurance company.

In our opinion there are no errors in the record sufficiently prejudicial to require the case to be sent back to the lower court for a new trial.

In view of the number of trials in this case, we think that "the maxim debet esse finis litium may well be applied." City of Chicago v. Schmidt, Admx., 107 Ill. 186, 190.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

in the case at bar.

Reliance for appellant, counsel argue in his contention that appellee should take not the "larger life or, rather" but that form that statement the jury really seriously considering that Mr. Rose represented the insurance company. Even so intimation is not given although in view of the fact that the appellee's counsel in the trial had the opportunity, and the duty, upon the notice of the trial, had the opinion, most disagreeably this having given of this fact, that he was misleading's counsel and was not entirely fair in insurance contract.

In our opinion there was no error in the trial court sustaining appellee's motion to exclude the case in the lower court for a new trial.

In view of the course of trial in this case, we think that "the ends justice would be better served" Gulf, C. & S. F. R. Co. v. Ledbetter, supra; Mo. Pac. R. Co. v. Stone, supra.

Affirmed.

Batchelor, C. J., and Dunkelberg, J., concur.

30 - 28284

(3475a)

BISHOP-HAMLIN COAL CO.,
a Corporation,
Plaintiff in Error,

vs.

WILLIAM DILLEY,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

232 I.A. 211

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error brought by the Bishop-Hamlin Coal Company, plaintiff in error, to reverse a judgment of the Municipal court of Chicago in favor of William Dilley, defendant in error.

Plaintiff in error claims that defendant in error owes it a balance of $129.60 for coal purchased by defendant in error during the year 1919. Defendant in error denies the claim and contends that plaintiff in error accepted a check from defendant in error in full payment for all of the coal purchased by defendant in error.

The only evidence in the case was introduced by plaintiff in error. According to the testimony of the secretary of plaintiff in error, he solicited defendant in error for orders of coal in May, 1919, and notified him that the price at that time was $7 a ton, but that the price would be materially higher later in the year. In the "early part of June," not having received an order from defendant in error, the secretary of plaintiff in error called on him and told him that "unless orders for coal were placed at once the quotations at $7 per ton would have to be changed." August 18, 1919, defendant in error ordered by telephone, through an employee in the office of plaintiff in error, 259.2 tons of coal, and directed the employee to call the order to the attention of either the secretary or president of plaintiff in error. When

(34,756)

Plaintiff-Respondent,
a Corporation,
Plaintiff in Error,

vs.

WILLIAM DALZIEL,
Defendant in Error.

Error to Appellate Court
of Illinois.

No. Justice Dockery delivered the opinion of the court.

This is a writ of error brought by the Illinois-Dunlop Rubber Company, plaintiff in error, to reverse a judgment of the Municipal Court of Chicago in favor of William Dalziel, defendant in error.

Plaintiff in first class under particular an error was in a balance of $19,31 for cost purchased by defendant in error during the year 1931. Defendant in error denies the claim and contends that plaintiff is under obligation a check from defendant in order to full payment for all of the work performed by defendant in error.

The only evidence in the case was introduced by plaintiff in error. According to the testimony of the secretary of plaintiff in error, he solicited defendant in error for orders of rubber in May, 1931, and received his first order on that date. Defendant in error was paid the price at that time was $7 a ton, but that the price would be somewhat higher later in the year. In the "early part of June," he testify received an order from defendant in error, the secretary of plaintiff in error called on him and told him that "unless orders for rubber placed at once the quotations at $7 per ton would have to be changed." August 18, 1931, defendant in error ordered by telephone, through an employee in the office of plaintiff in error, 200,2 tons of rubber, and directed the employee to call the order to the attention of either the secretary or president of plaintiff in error. When

the president learned of this order he telephoned defendant in error that no coal would be delivered at $7 a ton, but that the lowest price would be $7.50 a ton. Defendant in error told the president to "go ahead and fill up at that price." The coal was delivered, and invoices and statements were sent to defendant in error, which he paid without protest. March 26, 1920, defendant in error sent a letter to plaintiff in error enclosing checks for $97.14 and $462.30. The letter is as follows:

"Chicago, March 26th, 1920.

Bishop-Hamlin Coal Co.,
Sixty-first and State Street,
Chicago, Ill.

Gentlemen:

Enclosed you will find check for $97.14 paying bills of Jan. 19th and Feb. 23rd for 59th Street Bldg., also check for $462.30 balance due on the 1st fill-up contract coal, price of which was $7.00 per ton not $7.50 as billed - Credit deducted $.50 on 259.2 tons - $129.60, check for balance $462.30 enclosed.

Respectfully yours,
Wm. Dilley, Brush Mfg.,
22 N. Fifth Ave., Chicago,
Opposite The Daily News."

The check for $462.30, which defendant in error contends was the balance due to plaintiff in error, was credited to defendant in error on August 17, 1920, nearly five months after it was received. After receipt of the letter and check plaintiff in error sent defendant in error a bill every month for $129.60, the amount plaintiff in error claims is due from defendant in error.

The only question in the case is whether the acceptance of the check constituted an "accord and satisfaction." Counsel for appellant contends that "the claim is a liquidated claim," about which there was no dispute, and that a disputed claim is an essential element in an "accord and satisfaction." Counsel has correctly stated the rule of law, but in our opinion the evidence shows that there was a disputed claim. The dispute related to the question whether the price of the coal was $7 or

the president instead of the order to deliver the additional [illegible] in order that an end could be delivered at $7 a ton, but that the lowest price would be $6.50 a ton. Defendant in error told the president to "go ahead and fill up at that price." The coal was delivered, and thereupon the plaintiff was asked to [illegible] in error, which he did without protest. Later on, [illegible], defendant in error made a letter to plaintiff in error for $[illegible] for [illegible] charge for $[illegible] and [illegible]. The letter is as follows:

"Chicago, March [illegible], 19[illegible].

Blake-Hardin Coal Co.,
Sixty-first and [illegible] Street,
Chicago, Ill.

Gentlemen:

Enclosed you will find check for $[illegible] being balance of [illegible]. Kindly [illegible] and [illegible]. Also [illegible] for $[illegible]. We believe you on the last [illegible] to contract price, price of which was $7.00 per ton and $6.50 as billing - Credit balance, $.50 on [illegible] tons - $[illegible], check for balance $[illegible] enclosed.

Respectfully yours,
[illegible],
[illegible], [illegible] Co.,
[illegible] S. [illegible] Ave., Chicago,
Corporate Tax Delig [illegible]."

The check for $[illegible], which defendant in error mentioned was the balance due to plaintiff in error, was credited to defendant in error on August 17, 1910, nearly five months after it was received. After receipt of the letter and "[illegible]" plaintiff in error sent defendant in error a bill every month for $[illegible], the amount plaintiff in error claims is due from defendant in error.

The only question in the case is whether the exchange of the check constituted an "account and settlement." Counsel for defendant contends that "the check is [illegible] claim," about which there was no dispute, and that a disputed claim is an essential element in an "account and settlement." Counsel has correctly stated the rule of law, but in our opinion the evidence shows that there was a disputed claim. The dispute related to the question whether the price of the coal was $7 or

$7.50 a ton. This appears from the testimony of both the secretary and the president of plaintiff in error. It is also shown by the letter of defendant in error, which states that the price was "$7.00 per ton not $7.50 as billed." Moreover, the fact that plaintiff in error held the check of defendant in error for nearly five months before crediting it on the account of defendant in error is a circumstance which strongly indicates that plaintiff in error understood what the legal effect would be of accepting the check in the circumstances. Bloomquist v. Johnson, 107 Ill. App., 154, 156. Day-Snellwitz Lumber Co. v. Harrell, 177 Ill. App., 30-39. The fact that after receiving the check plaintiff in error sent a bill every month to defendant in error for the balance alleged to be due to plaintiff in error does not change the situation. If a check is offered in payment of a disputed account it must be accepted by the creditor on the terms upon which it is offered, or must be rejected. An acceptance will satisfy the demand although the creditor protests at the time that it is not all that is due him or that he does not accept it in full satisfaction of his claim. An acceptance in such a case is an acceptance of the condition notwithstanding any protest the creditor may make to the contrary. Snow v. Griesheimer, 220 Ill., 106, 110; Royal Colliery v. Coal Co., 276 Ill., 193, 198; Janci v. Gerny, 287 Ill., 359, 366.

For the reasons stated the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

$7.50 a ton. This appears from the testimony of both the secretary and the president of plaintiff in error. It is also shown by the letter of defendant in error, which shows that the price was "$7.50 per ton not $7.50 as billed." However, the fact that plaintiff in error held the check of defendant in error for nearly five months before crediting it on the account of indebtedness in error is a circumstance which strongly indicates that plaintiff in error understood that the legal effect would be of accepting the check in the circumstances. Pfaendtner v. Johnson, 107 Ill. App., 134, 136. Van-Sheriffs Lumber Co. v. Harrell, 177 Ill. App., 30-32. The fact that after receiving the check plaintiff in error had a bill every month to defendant in error for the balance alleged to be due to plaintiff in error does not change the situation. If a mistake is offered in payment of a disputed account it must be accepted by the creditor as the terms upon which it is offered, or must be rejected. An acceptance will safely lay demons although the creditor protests at the time that it is not all that is due him or that he does not accept it in full satisfaction of his claim. An acceptance in such a case is an acceptance of the condition notwithstanding any protest the creditor may make in the contrary. Dunn v. Friedrichs, 240 Ill., 104, 110; Dental Institute v. Cook Co., 272 Ill., 124, 128; Jones v. Jones, 187 Ill., 478, 481.

For the reasons stated the judgment of the trial court is affirmed.

Judgment affirmed.

Matchett, P. J., and McKinley, J., concur.

45 - 28314

(3476a)

HORACE E. HAVENS,
Appellee,

vs.

AMERICAN COTTON OIL COMPANY,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

232 I.A. 318

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The action in this case was brought by appellee to recover damages for an alleged breach of contract by appellant in regard to the sale by appellee to appellant of a tank of pressed Soya bean oil. The case was tried before a jury, which returned a verdict in favor of appellee for the sum of $580.25. Appellant has prosecuted this appeal from the judgment which was entered on the verdict.

Appellee was a dealer in vegetable oils, located in Chicago. He entered into a written contract with appellant, a corporation doing business in New York City and Chicago, for the sale of the oil in question on October 9, 1919. The oil was to be of "fair average quality." The price agreed on was 14 3/4 cents per pound. The contract stated that the tank was in transit from the Pacific coast. Appellee tendered the tank of oil to appellant in the early part of March, 1920, and appellant rejected it on the ground that the quality of the oil was not of fair average quality. Notice of the rejection was given to appellee by telegram of date March 9, 1920, as follows: "Car BMX one sixty eight arrived Chicago. We reject since quality not fair average stop arrange immediate replacement." Appellee admits that appellant was justified in rejecting the oil, and says that he, appellee, "accepted such rejection." March 9, 1920, appellant telegraphed to appellee to "arrange immediate replacement." March 13, 1920, appellant sent the following

MORRIS S. HAYNES, Appellee,	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
vs.	
AMERICAN METEOR OIL COMPANY, a Corporation, Appellant.	

MR. JUSTICE JONAETIS DELIVERED THE OPINION OF THE COURT.

The action in this case was brought by appellee to recover damages for an alleged breach of contract by appellant in regard to the sale of appellee's interest at a rate of twenty Mcf bbls oil. The case was tried before a jury, which returned a verdict in favor of appellee for the sum of $[illegible]. Appellant has prosecuted this appeal from the judgment which was entered on the verdict.

Appellee was a dealer in repairs, tools, etc., in Chicago. He entered into a written contract with appellant, a corporation doing business in New York and Chicago, for the sale of the oil in question on October 7, 1919. The oil was to be of "fair average quality." The price agreed on was $1.[illegible] cents per barrel. The contract stated that the tank was in transit from the Pacific coast. Appellee inspected the tank of oil in accordance to the early part of June, 1920, and appellant replaced it on the ground that the quality of the oil was not of fair average quality. Notice of the rejection was given to appellee by telegram of June [illegible], 1920, in relation: "Our TANK was nearly eight barrels Chicago. It takes place quality not fair average. When arrange immediate replacement." Appellee stated that appellant was justified in replacing the oil, and says that he, appellee, "arranged such replacement." March 9, 1920, appellant telegraphed to appellee as "arrange immediate replacement." March 12, 1920, appellant sent the following

telegram to appellee: "No reply received ours ninth. Are you arranging replacement. Demurrage accruing your account. Wire quick reply." March 17, 1920, appellant again telegraphed appellee as follows: "Are at loss understand why you ignore our wires ninth and thirteenth regarding our rejection BMX one six eight. Are you replacing? Wire immediate answer."

Appellee does not deny having received the above telegrams. In addition to the telegrams which were sent to appellee the Chicago manager of appellant called on appellee and requested appellee to replace the rejected tank. The manager testified that he had several conversations with appellee between March 9 and March 19, 1920, and that each time appellee "told him that he, appellee, expected a car in Chicago within a day or two and would give us the number;" that on March 19, 1920, appellee agreed to replace the rejected tank; that between March 19, 1920, and April 13, 1920, he, the manager, had conversations with appellee for the purpose of "ascertaining from him the number of the car he proposed to deliver to us, but he would advise he had tanks he expected to receive in a day or two and would then give us the number." The manager further testified that "in response" to his "continual inquiries for the number of the car" he "received no answer" from appellee. Appellee testified that he told the manager that he had replaced the car, but that he could not give him the "information about what the car was or where it was until he got it;" that he, appellee, thought he gave the information to the manager.

April 13, 1920, appellant telegraphed to appellee as follows: "Consider one tank Soya Bean Oil purchased from you cancelled account replacement not made immediately." Appellee replied to this telegram on April 14, 1920, as follows: "We insist you accept tank Bean Oil which we purchased week ago cover sale made to you. We accommodated you by taking back BMX, one

telegram to Apollinaire: "We really received more cinch. Are you arranging replacement. Insurance covering your account. Write quite truly." March 17, 1970, Apollinaire again telegraphed as follows: "Are at loss understand why you ignore our wires which and Universal regarding our television XXX are six eight. Are you realizing? Wire immediately answer."

Apollinaire does not deny having received the above telegram. In addition to the telegrams which were sent to Apollinaire the Chicago manager of Apollinaire called on Apollinaire and requested Apollinaire to replace the replaced car. The manager testified that he had several conversations with Apollinaire between March 9 and March 17, 1970, and that each time Apollinaire told him that he, Apollinaire, expected a car in Chicago within a day or two and would give us the number;" that on March 19, 1970, Apollinaire agreed to replace the replaced car; that between March 19, 1970, and April 13, 1970, the manager, had conversations with Apollinaire for the purpose of "ascertaining from him the number of the car he proposed to deliver to us, but he would advise he had taken he proposed to receive it a day or two and would then give us the number." The manager further testified that "in response" to his "continual inquiries for the number of the car" he "received no answer" from Apollinaire. Apollinaire testified that he told the manager that he had replaced the car, but that he would not give him the "information about what the car was or where it was until he got it;" that he, Apollinaire, thought he gave the information to the manager.

April 13, 1970, Apollinaire telegraphed to manager as follows: "Consider you took care been old purchased from you concealed mechanic replacement not make immediately." Apollinaire replied to this telegram on April 14, 1970, as follows: "We inform you account Jimmy Dean Oil which we purchased each car never said made to you. We accommodated you by taking back 20%, one

six eight, incurring loss thereby." April 14, 1920, appellant telegraphed to appellee as follows: "If you consider we have not right cancel contract, are you willing arbitrate matter before New York Produce Exchange?" On April 15, 1920, appellee sent the following telegram to appellant: "We purchased tank for you same day we accepted tank back from your Chicago branch for replacement. We paid sixteen one quarter cents pound. We were forced resell yesterday fourteen one quarter cents. We expect you reimburse us account your sudden cancellation."

Several errors are assigned by counsel for appellant as grounds for reversal.

It is contended by counsel that there is a material variance between the contract sued on and the contract proved by the evidence; that the contract alleged in the declaration of appellee is a contract of the date of March 26, 1920, and that it was admitted on the trial by counsel for appellee that appellee was "only claiming under a verbal contract;" that the contract established by the evidence is a written contract of the date of October 9, 1919. Counsel for appellant are correct in their contention that there is a material variance. There was no proof of a verbal contract of March 26, 1920. The only contract established by the evidence was the written contract of October 9, 1919. The evidence shows that in requesting appellee to replace the rejected tank appellant was merely urging appellee to fulfill the contract of October 9, 1919, which obligated appellee to furnish a tank of oil of "Fair average quality." In appellee's testimony and in his telegrams to appellant, appellee himself refers to the transaction as a "replacement" of the tank oil which it was mutually agreed should be rejected. In using the word "replacement" appellee recognized that he was proceeding under the contract of October 9, 1920, and not under a new verbal

six eight, inserting cord thereby." April 16, 1900, Griffiths telegraphed to Appelles as follows: "If you consider we have not right owners contract, see you obtain architects master before New York Express Embassy." On April 24, 1900, Appelles sent the following telegram to Griffiths: "We purchased land for you some day we accepted land back from your Mr. Lo. Lamb for replacement. We paid eleven lac rupees cash. We were forced recall previously furnished our master carpet. We cannot you replacement to answer your orders conditions."

Several errors are analysed by counsel for appellants as grounds for reversal.

It is contended by counsel that there is a material variance between the contract sued on and the contract proved by the evidence; that the contract alleged in the declaration of appellee is a contract of the date of March 26, 1900, and that it was admitted on the trial by counsel for appellee that appellee was "only claiming under a verbal contract;" that the contract established by the evidence is a written contract of the date of October 9, 1900. Counsel for appellants are correct in their contention that there is a material variance. There was no proof of a verbal contract of March 26, 1900. The only contract established by the evidence was the written contract of October 9, 1900. The evidence shows that in response appellee to replace the returned land appellant was merely urging appellee to fulfill the contract of October 9, 1900, which original appellee to furnish a rug of all of "fair average quality." In appellee's testimony and in his telegrams to appellant, appellee himself refers to the transaction as a "replacement" of the land all which it was mutually agreed should be replaced. In using the word "replacement" appellee recognized that he was proceeding under the contract of October 9, 1900, and not under a new verbal

contract. Moreover, the court expressly instructed the jury that the case was to be considered in relation to the contract of October 9, 1919. No new consideration was necessary to support the duty of appellee to replace the rejected tank as the consideration of the contract of October 9, 1919, which was in force and unfulfilled, was sufficient. Hinrichs v. Consolidated Adjustment Co., 145 Ill. App., 8, 11.

The record is not in proper form to present the question of a variance, but it does present the question whether there is sufficient evidence to support the declaration. At the close of appellee's evidence counsel for appellant made a motion for an instruction to the jury to return a finding in favor of appellant on the ground of a variance between the allegations and the proof. The motion did not specifically point out the variance, as the rule requires shall be done, even where the motion recites that it is on the ground of variance. Libby, McNeil & Libby v. Sherman, 146 Ill. 540, 549. In that case the court said (p. 549): "It is true that one of the grounds assigned by the defendant in its motion for a new trial was in these words: 'There is a variance between the declaration and the proof,' but even there the variance was not pointed out. That was not sufficient. It was not incumbent upon the trial judge, upon such challenge, to grope through the record in an endeavor to discover a variance, but it was the duty of the defendant's counsel, if one existed, to point it out and call attention to it specifically, and having failed so to do, he must be deemed to have waived the objection."

There may be a distinction between the case at bar and the case of Libby, McNeil & Libby v. Sherman, supra, but it is not one that properly should be recognized. In the case at bar in view of the admission by counsel for appellee that appellee was

contract. However, the court expressly interpreted the jury's task the same way as to be consistent in relation to the contract of charter v. Yale. In the instructions was necessary to support the jury's decision to reject the unjustified claim on the construction of the contract of charter v. Yale, which was in fact one of utilities, not utilities. Elmendorf v. Continental Insurance Co., 4 F.2d 1, 2 Cir., 1, 11.

The answer is not in proper form to present the question of a variance. Yet it does present the original contract there is sufficient evidence to support the interpretation. If the claim of Yale's brief was should for appellant's motion for an instruction so the jury in terms of a finding in terms of appellant on the ground of a variance between the claim and the proof. The motion did not specifically point out the variance, or the proof variance. Yet it is on the ground of variance. Elmer, Mandel & Adler v. Ginsberg, 116 Ill. 470, 482. In such case the court said (p. 480). "It is true that one of the grounds assigned by the defendant in error for a new trial was in these words: 'There is a variance between the contracts and the proof,' but even then the variance was not pointed out. This was not sufficient. It was not incumbent upon the trial judge, even upon objection, to point out the errors in an endeavor to discover a variance, but it was the duty of the defendant's counsel, if one existed, to point it out and call attention to it specifically, and having failed to do so, he must be deemed to have waived the objection."

There may be a distinction between the case at bar and the case of Elmer, Mandel & Adler v. Ginsberg, supra, but it is not one into necessary decide by stipulation. In the case at bar the view of the objection by counsel for appellee that appellee had

only claiming under a verbal contract, and not under the written contract of October 9, 1919, it would appear that the court and counsel knew the nature of the alleged variance; and that the statement of the specific variance by appellee would have been superfluous.

But the rule as stated in Libby, McNeil & Libby v. Sherman, supra, is implicit in its requirement that the precise variance should be pointed out. If this rule was modified so that the specific statement of a variance could be dispensed with, when from the record it appeared to be evident that court and counsel were clearly aware of the variance, the result would be that the question whether the objection of a variance had been saved for review, would frequently resolve itself into an inquiry whether the variance plainly appeared to court and counsel from the record. Such an inquiry would, we think, be opposed to the spirit and intent of the rule requiring the variance to be specifically pointed out. We are of the opinion that the rule as defined in Libby, McNeil & Libby v. Sherman, supra, should be strictly adhered to. But at the close of appellee's evidence counsel for appellant also made a motion to exclude the evidence from the jury and that the jury be instructed to return a finding for appellant. As we shall show later, although this motion did not raise the question of variance (Harris v. Shebek, 151 Ill., 287, 292, 293) it did present the question whether the declaration was sustained by the evidence, or, in other words, whether appellee had made out a prima facie case. Kelly v. Chicago City Ry. Co., 283 Ill., 640, 642. In our view appellee did not make out a prima facie case and the motion should have been allowed. Appellant, however, introduced evidence and thereby abandoned the motion. Harris v. Shebek, supra; Ferrero v. Knights of Security, 369 Ill. 476, 478, 479.

only claiming under a verbal contract, and not under the written contract of October 9, 1919, it might appear that the court had concerned have the nature of the alleged tenancy; and that the statement of the specific contract by quantity would have been superfluous.

But the rule as stated in Adkins, Bennett & Adkins v. Stevens, supra, is implicit in its pronouncement that the proper variance should be pointed out. If the rule was modified so that the specific statement of a variance could be dispensed with, when from the record it appeared to be evident that counsel and counsel were clearly aware of the variance, the result would be that the question whether the objection of a variance had been saved for review, would frequently result into an inquiry whether the variance actually appeared to counsel and counsel from the record. Such an inquiry would, we think, be repugnant to the spirit and intent of the rule requiring the objection to be officially noticed and. It was of the opinion that the rule as defined in Adkins, Bennett & Adkins v. Stevens should be strictly adhered to. But in the close of specifically asserted counsel for appellant also made a motion to exclude the evidence from the jury and that the jury be instructed to return a finding for appellant. As we shall show later, although this motion did not raise the question of variance (Bennett v. Bennett, 124 Ill., 297, 302, 303) it did present the question as to the testimony was sustained by the evidence, or, in other words, whether evidence had made out a prima facie case. Smith v. Chicago City Ry. Co., 183 Ill., 280, 282. In our view appellee did not make out a prima facie case and the motion should have been allowed. Appellant, however, introduced evidence and thereby abandoned the motion. Smith v. Chicago, supra; Bennett v. Bennett, 124 Ill. 476, 479.

At the close of all the evidence a general motion was made to exclude the evidence from the jury and to instruct the jury to find for appellant, without alleging as a ground of the motion that there was a variance. Under the rule such a motion was insufficient to present the question of variance. Harris v. Shebek, supra. In that case the court said (pp. 292, 293): "This record does not show that evidence was objected to because of variance between the proof offered and the allegations of the declaration, nor was there a motion to exclude because of variance. It does appear that when plaintiff rested his case the defendant moved the court to instruct the jury to find a verdict for the defendant, but no ground for the motion was further stated, and that motion was denied. * * * No question of variance arises on this record, that can be availed of in this court." The rule regulating the procedure in regard to saving the question of variance for review requires that the variance must be specifically pointed out in some appropriate manner, in order that an opportunity may be given to obviate the objection. Carney v. Marquette Coal Mining Co., 260 Ill., 220, 225; Libby, McNeil & Libby v. Sherman, supra.

Although the question of variance was not raised by the motion which appellant made at the close of all of the evidence to exclude the evidence from the jury and to instruct the jury to find for appellant, yet that motion raised the question whether "there was in all the evidence testimony fairly tending to support" appellee's "cause of action." Blakeslee's Express Co. v. Ford, 215 Ill., 230, 233, 234. In the case at bar, in our opinion, there is no testimony "fairly tending to support" appellee's cause of action. As we have previously stated, the cause of action, as alleged in his declaration and admitted on the trial by his counsel, arose on an alleged verbal contract

At the close of all the evidence a general motion was made to exclude the evidence from the jury and to instruct the jury to find for defendant, without alleging in a ground of the motion that there was a variance. Under the rule that a motion was insufficient to present the question of variance, Lucas v. Moore, supra. In that case the court said (ex. 301, 302): "This record does not show that evidence was offered to prove or variance between the proof offered and the allegations of the declaration, nor was there a motion to exclude evidence on ground of variance. It does appear that when plaintiff rested his case the defendant moved the court to instruct the jury to find a verdict for the defendant, but no ground for the motion was further stated, and that motion was denied. . . . No question of variance arises on this record, that can be availed of in this court." The rule requiring the probative to object in having the question of variance for review requires that the variance must be sufficiently pointed out in some appropriate manner, in order that an opportunity may be given to obviate the objection. Lawson v. Kansas City Railway Co., 200 Ill., 290, 296; Illinois Central R. Ry v. Chapman, supra.

Although the question of variance was not raised by the motion which objection made at the close of all of the evidence to exclude the evidence from the jury and to instruct the jury to find for defendant, yet that motion raises the question whether "there was in all the evidence testimony fairly tending to support" appellee's "cause of action." Chicago's Service Co. v. Ford, 216 Ill., 238, 244. In the case at bar, in our opinion, there is no testimony "fairly tending to support" appellee's cause of action. As we have previously stated, the cause of action, as alleged in his declaration and admitted on the trial by his counsel, arose on an alleged verbal contract

of the date of March 26, 1920, whereas the proof shows that the cause of action grew out of a written contract of the date of October 9, 1919. In this sense it is true that there is a variance in that the proof shows a different cause of action from that alleged in the declaration. Chicago Union Traction Co. v. Brethauer, 223 Ill., 521, 525. But the question should be considered by the courtin the case at bar "within the limitations of the rule" relating to objections that the proof does not support the declaration. Chicago Union Traction Co. v. Brethauer, supra. Considering the question within the meaning of that rule, we are of the opinion that the motion of appellant should have been granted, and that the court erred in denying the motion. The action of the court in refusing to grant the motion and at the same time instructing the jury on the theory of the contract of date of October 9, 1919, was clearly inconsistent. However, appellant cannot assign error on the giving of the instruction, as it was given at appellant's request. Henry v. Stewart, 185 Ill., 448, 453.

In view of the distinction that we have recognized between the rule governing cases where there is a variance and the rule governing cases where there is an entire absence of proof, we think that it is proper for us to state that the distinction should be preserved, for the reason that although there may be a variance when there is an entire absence of proof, it does not always follow conversely that there will be an entire absence of proof when there is a variance.

Counsel for appellant further contend that the verdict is manifestly against the weight of the evidence. We have previously expressed the opinion that the transaction relating to the replacement of the tank of oil was a continuation of the contract of October 9, 1919. The precise question remaining on the evi-

of the date of March 18, 1918, whereas the proof shows that the cause of action grew out of a written contract of the date of October 9, 1916. In this sense it is true that there is a variance in that the proof shows a different cause of action from that alleged in the declaration. Chicago Union Traction Co. v. Breitmayer, 194 Ill., 80, 88. But the pleading should be considered by the courts in the case of our "liberal rule relating to objections that the proof does not support the declaration. Chicago Union Traction Co. v. Breitmayer, supra. Considering the question within the meaning of that rule, we are of the opinion that the motion of defendant should have been granted, and then the court erred in denying the motion. The motion of the court in refusing to grant the motion and in the same time instructing the jury on the theory of the contract of date of October 9, 1916, was clearly harmful. However, no peremptory instruction appears on the finding of the declaration, as it was given at appellant's request. Kerr v. Hickey, 148 Ill., 148, 152.

In view of the discussion that we have respectively between the two preceding cases where there is a variance and the rule controlling cases where there is no action element of proof, we think that it is proper for us to state that the distinction should be preserved, for the reason that otherwise there may be a variance when there is no active evidence of proof, it does not always follow conversely that there will be no material absence of proof when there is a variance.

Counsel for appellee further contend that the judgment is manifestly against the weight of the evidence. We have carefully considered the evidence that the transaction relating to the replacement of the tank of oil was a continuation of the contract of October 9, 1916. The greater question presented on the evi-

dence is whether appellee delayed such an unreasonable length of time in replacing the rejected tank as to justify appellant in cancelling the contract. The tank was rejected by appellant on March 9, 1920, and appellee was notified by appellant of the cancellation of the contract on April 13, 1920. Appellee testified that he bought a tank to replace the one rejected and tendered it to appellant according to the trade customs with proper bills of lading. But as far as we are able to discover the evidence does not show how or when the tender was made. The testimony of appellee as to when he purchased the tank is not clear. He testified that he replaced the tank "in the earliest possible time;" that he "purchased a tank immediately" after the rejectment of the first tank. In his telegram of April 14, 1920, to appellant he says he purchased the tank a "week ago;" and in his telegram to appellant of April 15, 1920, he states that he purchased the tank the "same day" that he accepted the rejected tank. In a letter which appellee wrote to appellant after appellee received notice of the cancellation of the contract, appellee stated that "as soon as" he took back the rejected tank on March 26, 1920, he "immediately" purchased a tank to replace the one rejected. We can find no evidence, however, that appellee notified appellant that he had purchased the tank either on or about March 26, 1920, or on any other date. The evidence shows that after appellant had sent repeated telegrams to appellee requesting him to make the replacement and had received no reply from him, the Chicago manager of appellant personally requested appellee many times to make the replacement, but all to no avail. There was testimony on behalf of appellant that according to the custom in the oil industry "replacement means that the seller may replace within forty-eight hours after being advised of the rejection of oil, or

he may declare the oil from any point where shipment would have been originally made within the contract period." Appellee testified that "it takes over a month or two months to get a tank from the Pacific Coast" to Chicago, and that the "documents in the meanwhile go through a dozen different hands;" that "there is no precedent or set time in the trade that directs a time for the documents to go through or the tank to go through." The default of appellee, however, consisted in not notifying appellant that he had purchased a tank of oil to replace the tank that was rejected. Appellant was unable to get any response from appellee after continual urgent efforts. In our view the delay of appellee was clearly unreasonable, and we think that appellant was justified in the circumstances in cancelling the contract. We are of the opinion that the verdict of the jury was manifestly against the weight of the evidence.

The judgment of the trial court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Matchett, P. J., and McSurely, J., concur.

be any desire, for all that any sound civic minded would have been criminally made guilty, the contrary action." Lawyers insisted that "it takes over a month or two months to get a vest from the Jewelry Guild." In Colorado, one wrote the "Secretary in his capacity as treasurer of Denver Lodge," that "there is no procedure to get alms in the Denver that expects a time for the department to go through or the lack to go through." The lawyers of Wyoming, however, concluded in not particular emphasis that he had accomplished a part of all in getting the lack that was required. Lawyers had worked to get any payment from Colorado after continued direct activity. In the view the lodge of Wyoming was directly accomplished, and so stated that "nothing the Institute in the difficulty accomplishing the contract. To are of the opinion that the members of the Lodge are unanimously against the weight of the criminal.

The lawyers of the lodge order is involved and the same problem.

Further advantage its lodge solution.

Respectfully, J. T., and Lawyers, J., Denver.

60 - 28330

(347 a)

ANNA DAMIANI,
Appellant,

vs.

SALVATORE DAMIANI,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

232 I. A. 614

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Anna Damiani from a decree of the Superior court of Cook County, dismissing for want of equity her bill for separate maintenance and also dismissing the cross-bill of appellee for divorce. The court found that neither party was entitled to relief.

The grounds for separate maintenance alleged in the bill of appellant are cruelty, unjust accusations of unchastity, and allegations presumably intended to charge adultery. The parties were married February 10, 1909. They have two children, one nine years of age and the other six.

On the question of cruelty counsel for appellant assert that appellee "assaulted" appellant "on divers and various occasions," but counsel discuss only the evidence relating to one act of cruelty. That act occurred on Sunday, May 7, 1922. As the question is purely one of fact we will set out the testimony at length. On direct examination appellant testified as follows:

"Doctor came in and I had dinner all prepared and was going down to the basement to get a bottle of cream and cheese. When I came up stairs I noticed the doctor's car outside; it was washed and I asked him if he had his car washed the night before, and he said 'yes.' And I said, 'Where did you have your car washed? He certainly gave it a nice cleaning.' He said, 'At

ANNA GARTAGI,
Appellant,

vs.

SALVATORE TARTGI,
Appellee.

VOTING THIS ARTICLE FOR DATA
IN THIS CASE.

Ch. 1000 ADDING SECTION 3000 TO DIVORCE IN THE CODE.

This is an appeal by Anna Gartagi from a decree of the Superior Court of Inner County, dismissing her suit of action for divorce on the grounds of the defendant's adultery. The only issue was whether the defendant was guilty of adultery.

The records for separate maintenance allowed in the bill of equity are clearly, without exception, of marital and alimentary relationship, intended to secure privileges. The parties were married in Rome, Italy. They were married in Italy, and have lived in Italy ever since.

In the question of jurisdiction the defendant has argued that provide "adultery" indicates the defendant and wife, one exception," for which divorce only the provisions relating to the act of adultery. This was considered in Gartagi, 1, 1972, in the question is merely one of fact we will not the transmission of Italy. In Gartagi appellant argument as follows:

"Where there is not I did Gartagi did attempted not be going from to the defendant to get a habit of adultery and adultery. Then I were on adultery I believed the adultery was committed, it was wanted and I agreed like it he did his her manner the adult matters, and to said 'yes.' and I said, 'Where did you have your her wife?' He particularly gave it a name elsewhere." He said, 'In

the same place as usual.' I asked him if he would grate the cheese while I whipped the cream. He started grating the cheese and he said, 'I am in the mood for having a hell of a good fight today.' I said, 'You are?' and he said, 'Yes.' I said, 'All right, then,' and with that he picked up the platter that he was using and hurled it at me. I said, 'That damnable temper of yours.' 'No,' he said, 'I'll finish this fight.' He ran in the bedroom and said, 'Where is the gun?' I had cleaned the house on Saturday and with that put the gun away. Then he came back running to me and grabbed one of my hands and with that he punched me right in the nose and my nose started to bleed and with that he grabbed both hands and in order to free myself I put my teeth into his wrist and with that he let go. Marie (the daughter) came running in and said, 'Let mamma alone.' I said, 'Marie, run over for Uncle John.' He lived two doors away from me. I said, 'Run for Uncle John,' and Marie ran over there to get John and John came over and saw my nose bleeding and said, 'What is the matter?' I said, 'The doctor is fighting again,' and he could see my nose bleeding and he said to my husband, 'Why don't you take a walk around the block and cool off?' With that he got between the two of us. Q. Did he take hold of you? A. Yes. Q. What kind of language did he use? A He used the awfulest language - he said I was a prostitute, a son of a b. and everything else."

On cross-examination appellant testified as follows:

"On the Sunday when we separated something happened that made the doctor angry and I became angry too and called him a Guinea, or something like that, which did not help matters any. I did not scratch his face, John did, and I bit him in the hand in order to make him release the carving knife. I do not know how long I held him by the hair. When my brother came there we were quarreling, and he said, 'What are you doing? Now, here,

the same place as usual." I asked him if he ever saw the chance while I admired the grass. He crushed grasses, the dewed and he said, "I'm in the habit for holding a ball of a good flight again." I said, "You ever" and he said, "Yes." I said, "All right, then," and with that he slipped on the dewy then he was using and buried it in an. I said, "This morning camper of yours." "Ha," he said, "I'll tinker this right." He had in the balcony and said, "Come in the yard." I had cleared the lawn so Saturday but left the rest. Then he went back repeating to my and grabbed and at my lawn and with that he squatted on right in the back of my house started to blame our with the grass he grabbed but never stopped to enter in the yard. I put my arms into his armpit and said to enter that he let go. (the "mumbling" here meaning in his mind: that lawn clean." I said, "Hah!", the grass for right down." He lived for dewed away from me. I said, "Get for right down." and lying for near down to get food and from lawn very and was at near blending and said, "Does it now matter?" I said, "The weather is right lawn," and by, could see my near blending and he said to my mother.

"Why don't you take a walk around the block and leave me?" "Can leave he get between the two of us." "Ha." He lake lake of yard "Yes." "Your kind of language is not" "I do not the mental language - he said I was a vagabonds, a son of a and everything else."

He grass-mumbling muttering sanitized to follow:

"In the Sunday dewy we appeared Sunday morning that made the Senior Sunday and I became Sunny Jim and walk Jim's fellows, or wrestling life-time. Jim's life not hair writing my. I did not remember life-time. Jim lost and I ran Jim to the hand in order to make him remove the wrestling walls. I do not know how long I held him up the hair. Then my mother came home to see something, and he said. "What are you doing, Jim, Jim,

you two are at it again.' He blamed us both and the doctor turned to the little girl and said, 'Next time papa and mamma quarrel you step out and don't go next door to call the neighbors.' My brother did not like this statement very much nor I, and I said, 'John, put him under arrest.' John grabbed him by the hand. This happened in out home where we lived. They both got warmed up and they started to quarrel and went out on the porch and started to fight. He bit John in the thumb and John went after him' John punched him in the face several times. John had a hold of the doctor as soon as he placed the doctor under arrest. My husband was bleeding and was cut up. One eye was blackened and scratched up. His cheek was bloody. In a couple of minutes they came back and the police patrol wagon came and they took him away. I went to the station and signed the complaint. The case came up a week or two after that and the doctor was discharged and in the meantime I filed my bill for separate maintenance; and an injunction was entered restraining him from coming to my house and since that time the doctor has not been there except to take the children out."

John Peterson, the brother of appellant, testified in behalf of appellant on direct examination as follows:

"On Sunday, May 7, 1922, I was called to my sister's home and I saw my brother-in-law holding her by the two wrists and she was trying to get away from him, and my sister's nose was bleeding and the leg of the table was knocked from under there and I noticed a plate smashed on the floor. I told the two of them how foolish they were quarreling like that. I didn't interfere, which he appreciated and said, 'It was good not to interfere with their family affairs.' And he left the house for his mother's place across the street; and he came back again and said to the children, 'The next time mamma and I have any quarrels, don't run out and tell the neighbors about it.' I said somebody must pro-

you two out of it again." He blurted as both our mouths opened to the little girl and wife. "Your video cues not answer questions, you stop cue and don't go back down to full log continuous." My brother did not like this statement very much nor I, and I said, "Sam, put him under arrest!" Sam grabbed him by the neck. This incensed to our home video to start. Only with his shoulder up and they started to wrestle and what not in the dining and finally to fight. He hit Jim in his stomach and Jim went with after him. Jim punched him in the face several times. John ran - full - at the dining as soon as he drawn the smaller video camera. My mother was screaming and was out of. The cops was frightened and terrified by. All dogs was barking. In a matter of minutes Jim, John and the police without right side had fallen into a ditch. I ran to the station and called the ambulance. The video came on a truck to the after that had its video cue illegally and in the small in I filed my bill for excessive philosophers and an authorities was severed particularly the time another to go home and claim that the mother has not been cause damage to have the children too." Jim Kenny's, the brother of mystery, continued to behave in a manner by blunt insubordinate to relative:

"On Sunday, May 7, 1978, I was called to my sister's home and I saw my brother-in-law fighting her by the eye. He was not our was going to get into trouble, as my sister's eye was bleeding and the log of the table was damaged from under cover and I noticed a black member in the floor. I tell him the of does he feelish that here quarrelling after that. I sister's interfere, which he accelerated and said, "It was just not to interfere with family affairs." And he left the house for the mother's view and the mother and he came back again not said to the mis-chief, "The week time passed and I have not quarrels, don't fun out and tell the neighbors about it." I said somebody made give-

test her. And we started talking around there and my sister said to put him under arrest, and I made a grab for him with my left hand and he was still in a fighting mood and grabbed my thumb in his mouth and we started scrambling around there. I had to subdue him. When I told him he was under arrest and he said all right, that is all he could say. The police wagon came. We put him into it and booked him on disorderly conduct and he was afterward discharged. The doctor also took out a warrant against me and I was also discharged. I have been to their home often and heard them in petty quarrels but paid no attention to them and I do not remember much cursing around there. They had quarreled about some woman. They were always having those quarrels about a woman. The children verified my story all the way through that he grabbed her in the back of the neck."

On cross-examination Peterson gave the following testimony:

"I don't know how many black eyes he had. His face was bruised, lips were bruised and swollen, cheeks bruised. I struck him a few times to subdue him. He couldn't get under my control and I had to subdue him. I hit him after I grabbed him after he was under arrest. I hit him and he would not go, so I had to put him out on the back porch. I did not like the way he spoke to the children. My sister said, 'Put him under arrest and get rid of him.' That was after the fight was finished and after he had been at his mother's place he came back. I told the doctor that I didn't like the way he talked to the children or something to that effect, and the doctor told me to mind my own business and he told me to get out, that that was his home. And when she said, 'Put him under arrest, John,' and I was outside of the door, I made a grab for him and then he bit my thumb and I struck him half a dozen times. She told me to lock him up because he was in a fighting mood. I told the officers to lock him up."

that day. Not as seemed talking around there and my father said
to that old Indian servant, and I made a point for him with my hand
and he was still in a flutter with and another my hand. In
his words and he started screaming around there. I had to moving
him. When I told him he was under arrest and he said all right,
then it is all he could say. The soldiers around them. My pipe fell
it and broke his pipe electrically damaged and he was frightened dam-
damned. The doctor said that it a nervous condition as well I was
also disappointed. I stay home in bed - have little not under pres-
in early quarrels but said he intending to take me I to his sanctu-
ber much morning longer there. They had ancestors about who lived.
They were always looking down towards their a manner. The soldiers
revolted up then all the way to Kenya and he pushed him in the
face of his arms.'

An after-conversation Pakenyan gave the following
tap-image:

'I don't know my lower right case in war. His face
was broken, like were broken and soldiers, towards medicine. I
advised him a few times to return home. He wouldn't get back my
country and I had to return him. I did the with I gathered the
after he was under arrest. I did him and he would not go, so I
had to put him out on the road with. I did not like his people
weak in the military. My clerks said. 'Go his under arrest and
get air or plane.' Not was after the front the soldiers and after
he had been at his master's home he was here home. I told the doctor
that I didn't like the way he talked to the soldiers or something in
that effect, but the doctor said we to hold my my tongue and he
told me to put out, that that was his home. And then he said, 'Put
his under arrest, John.' And I the soldiers of the Navy. I made a
mess for him and then he hit my hand and I struck him half a dozen
times. The just as he tore him on because he was in a fighting mood.
I said the officers to take him on.'

Mary Damiani, the sixyear old daughter of the parties, testified in regard to the alleged act of cruelty in question, that she saw her father strike her mother on the nose and make it bleed, but that she was not present at the beginning of the quarrel. In one part of her testimony she testified that she did not think that her uncle John Peterson struck her father. Later she testified that her uncle did not strike her father at all. The uncle, however, admits that he struck him. This circumstance shows the child's bias in favor of her mother and impairs the weight of her testimony.

Appellee's version of the affair in question is as follows:

"On the Sunday in question I told my wife I am trying to be a good fellow and trying to take care of you and love you all I can and you come in here on the least provocation and put up a fight. I said, 'Let's try to get along.' Her answer was, 'Go on, you dirty Guinea, you Dago, you Blackhander.' Your Honor, I took the dish and threw it up against the chair and faced her. She grabbed my hair the right hand and with the left she grabbed my face and I grabbed her wrist. She cried for help as loud as she could. I said, 'What is the use of you crying that loud, I'm not hurting you. She struck me one, two, three, four times, so I let go of her right hand, and as she raised her foot to kick me I grabbed it and she fell down, and after that some more help and some more crying. I went down on my bended knee and asked her to quit crying. I said, that is a disgrace to the children and the family for you to act like that. I assisted her up and let her go. John came and said it was a shame and a disgrace for us people to act that way. I said, 'John, it's not my fault.' I came in trying to be as nice as I could and she starts something for nothing. I took my hat and coat and said to her I am going and I went over

Mary Beaufort, the director and founder of the society, replied to regard to the mission and of America in question, and she saw her firmly within her station so the same for such to listen, but this the not answer so the religious of the question. In one part of her lectures she indicated that we did study Jane Fairness visual art fiction. Later the realized that her work did not write her fiction at all. The notes, conversation should be visual too. While discussion been the child's face is funny if she notice her teacher for moment of her feelings.

Question's answer if the after is useful, is a

Fairness

The the reason is question I notice mile I be trying to be in a long fifties and trying to take care of you and love you all I can and put also it take of the first conversation and do us a right. I said, 'Don't say it out aloud.' The answer was, 'Oh no, you dirty Indian, you know, you disbelieve.' Then Mary, I turn the room and shove it on another the house and lower her. She pushed my face and I pushed her back. She could not stand to stay in the room. I said, 'Why is the of you acting like that, I'm not hurting you.' Mrs Bloyd is home, and, Gwen, that time, so I had to of her right back, and in the valued her that is true as I pushed it and the fair land, and while that was very and some more or less. I was down at my house then not leave her to dull anyone. I said, what is a language is the anything and the family for you is not like that. I suddenly [illegible] and the Jo, that time and will if the a home and a Bloyd for the people is and that way. I said, 'Look, it's not my fault.' I now is trying to be in air, so I could not the other worried for anyone. I look up that and that not and to one I so, but not I was just

to my mother's and she saw my face scratched. I left my mother's home and I saw my little girl sitting in her brother's Ford, and I said, 'Marie, come in the house, papa wants to see you.' We walked in, and in front of Mr. Peterson (Uncle John) and said, 'Listen, honey, whenever papa and mamma have any words together or there is any fuss of any kind, please don't stay in the room but stay outside.' All at once Peterson (Uncle John) jumped at me and said, 'Listen here, don't you dare ever come in the house and fight with my sister. When she calls you a Dago or a Guinea or a Blackhander, take your hat and go out.' I said to him, 'Listen, John, what right have you to interfere in my home affairs? Did your sister fill you up now?' I said, 'Get out of my house and stay out.' My wife turned around and said, 'No, he's not going out; he has as much right in this house as you have.' Up he comes, he said, 'All right, you son of a bitch, get out; I am protector in this house,' and he started. Blow after blow on my face in the kitchen door; right at the entrance of the kitchen. I covered my face as best I could. I backed out on the porch. I tried to make a grab for the pillar but I missed it. He grabbed me bodily and hurled me downstairs; then I heard my mother's voice saying 'My. boy, my boy,' and she stood between me and him. I saw a bottle on the ground; I picked it up and threw it; he grabbed my mother and pushed her aside, and over she went and he came for me again. He struck me in the ribs and in the face. He hit me as though I was nothing. Then he said, 'You're under arrest.' And he paraded me up and down the sidewalk, just as though he had gotten a hold of the worst criminal on God's earth. Then he jerked me in my parlor at home. In the meanwhile my wife called the wagon, and the wago' came and stopped in front of my entrance and the officers came and asked who was to be taken out, and I said I am. And the' me out to the wagon, and as I stood with one foot on the '

one on the patrol wagon, my wife and Mr. Peterson (Uncle John) stood at the entrance and Mr. Peterson (Uncle John) yelled at me and said, 'I hope they keep you there,' and my wife said, 'I hope they hang you.' I was taken to the station, to the station, to the Austin avenue station. I gave a $50 cash bond. The matter came up in court and I was discharged. Just as I backed out on the porch my wife said, 'Beat him up, John.' I didn't have a chance to strike my brother-in-law, I couldn't. The best thing I could do was to protect my face. I was right in the kitchen entrance when he started to strike me. I could not give the number of times. He did not come back to my home after that Sunday. Two days later I was handed an injunction saying that I had no right to appear in my home any more. I slept in my car in the garage for about five days and the rest of the days I slept in my office. That was between the first and the fourteenth. That was because I was not allowed to get in the house. My wife kept me back. My wife would not let me in."

In regard to another alleged act of cruelty appellant testified that in January, 1922, appellee grabbed her by the throat with both hands; that marks were made on her throat. Appellee's testimony in regard to this incident is that appellant called him "names;" that he grabbed her by the wrist and that she struck him; that he did not strike her.

Appellant's testimony as to another alleged act of cruelty is in substance that in February, 1922, appellee one night pounded her arms until they were black and blue. Appellee denied this and stated that he "used no force towards her that time nor any other time."

Appellee testified to specific acts of cruelty on the part of appellant. His testimony in that respect is as follows:

ure or the patrol wagon, my wife and Dr. Thompson (who's doing) stood at the entrance and Dr. Dalcourse (who's doing) paling as he said said, 'I have they have you worry,' not to make sure, it does they being you.' I was taken in the station, to the station, in the duelin arrest station. I gave a fro crude bond. The service saw up in court and I was discharged. Later on I turned out to the patrol my wife said, 'Does she go, dear.' I didn't have a chance to write my brother-in-law, I doubt'd. The fact that I had a chance to protect my fact. I was right in the kitchen returned from be started to strike me. I could not give her reason or cause. He did not come back to do some other that morning. The night before I was heated on intoxicated during case I had no right to appear in my home any more. I stand to my job as to the United Fr Coal Co. Here and the year of the day I stay in my office. That was between the first and the fourteenth. Then the Tuesday I was not allowed to get to the house. My wife lives no home. My wife could not let me in."

In regard to another alleged act of causing grievous bodily harm that in January, 1970, assaulting grievous the by the corner with both hands; that cause more pain to her liver. Applicant's testimony in regard to this incident is that applicant called the "woman;" that he grabbed her by the arm and that she struck him; that he did not strike her.

Respondent's testimony as to another alleged act of cruelty is to substance that in December, 1969, applicant was drunk passed her home until they had words and then. Applicant testified that and stated that he "went to have trouble but that this was any other time."

Respondent testified it occurred only at Christmas in the year of complaint. His testimony is that happened if he finished

"In October, 1917, we were having dinner. My sister walked in and asked my wife why she was telling me stories about me, that I am telling your husband things to cause trouble in the family. My wife flew into a rage. She was frying some eggs; frying pan and eggs flew towards me. One of the eggs struck me in the face. Maybe the 16th or 17th, October, 1917, we had an argument and she started fighting. She struck me four or five times; kicked me six or seven times in the basement of the house. That was May 7th. Struck me on the shoulder with a fern dish. That was in June, 1919. She took up the fern dish and threw it and hit me on the shoulder. She forced me out of the house on the day she had a fight with my sister when she threw the frying pan at me. On May 7th she first grabbed my hair. Scratched my nose and face and bit my wrist without cause."

We are of the opinion that appellant is not entitled to a decree of separate maintenance on the ground of cruelty. The two acts complained of in January and February, 1922, are not established by a preponderance of the evidence; and the evidence shows that on May 7, 1922, appellant was as guilty as appellee. "Uncle John" not only administered a severe beating to appellee at the request of appellant, but in addition arrested appellee and took him to the police station. There is also evidence that appellant was guilty of acts of cruelty toward appellee on several occasions. The statute expressly provides that a woman can only maintain a bill for separate maintenance when the separation is without her fault. If she is guilty of misconduct similar to that of which she complains, then she is not without fault within the meaning of the statute. Johnson v. Johnson, 125 Ill. 510, 514; Anderson v. Anderson, 45 Ill. App. 168, 170. It has been held in divorce proceedings, and we think the same principle is applicable in suits

for separate maintenance, that a party charged with cruelty may show in defense equal acts of cruelty. Duberstein v. Duberstein, 171 Ill. 133, 145; Shoup v. Shoup, 166 Ill. App. 167, 170; Jenkins v. Jenkins, 104 Ill., 134, 136.

The evidence in regard to repeated accusations of unchastity that appellee is alleged to have made, is not sufficient to sustain a decree of separate maintenance. Appellee denies that he ever made such accusations. If he made them, it would appear that he did so in the heat of passion during some of the many altercations which arose between him and his wife. Appellant made similar accusations against appellee, and in many instances was guilty of conduct tending to provoke appellee to anger. Appellee testified that appellant's temper was bad; that she called him a "Guinea, Dago and Blackbander;" that on one occasion she locked him out of his home and he had to go to a hotel for the night; that on another occasion she locked him out again and that he had to kick the door down to get in; that appellant "found fault with a million things and a million women."

It is contended by counsel for appellee that the charge of adultery is not properly pleaded in appellant's bill of complaint. The bill alleges as follows: "That the said defendant has for a number of years last past consorted with women of lewd nature, upon whom he has lavished large gifts of jewelry, diamonds, furs, and other articles of luxury. That he had become infatuated with a certain woman he has equipped with a home on the north side, and that he is providing her with the necessities of a home, and that he is maintaining her in luxury and represents to the surrounding neighborhood that said woman is his sister."

In Hahn v. Hahn, 136 Ill. App. 301, in considering the sufficiency of a bill for divorce, the court said (p.302): "The bill also alleges that: 'the defendant has, for a considerable time past, given himself over to adulterous practices and is now

for separate maintenance, that a county charges with security may show in defense some sort of security. Commonwealth v. Whitehead, 171 Ill. 127, 129; Gunn v. Gunn, 149 Ill. App. 127, 130; Lindsay v. Tuohy, 104 Ill., 124, 126.

The evidence in regard to financial arrangements of appellant that appears in record in this case, is not sufficient to warrant a decree of separate maintenance. Appellee seems had be over some small accounts. If he made them, it would appear that he did so in the "act of passing [illegible] of the many alienations which [illegible] all his life. Appellant made similar conversations against appellee, and in most instances was guilty of somewhat taking to express opinions in anger. Appellee testifies that appellant's temper was bad; that she called him a "[illegible]," "[illegible]," "[illegible]" and "[illegible]" and that on one of his home calls he had to go to a hotel for the night; that on another occasion she threw his [illegible] and that he was to stick the door down to get in; that appellant "[illegible] with a million [illegible] and a million women."

It is contended by counsel for appellee that the change of authority is not proper; citation to appellant's list of complaints, the gift things of children: "[illegible] for [illegible] and the [illegible] number of years that [illegible] -[illegible] woman of [illegible] mission, when she had [illegible] large [illegible] of jewelry, diamonds, furs, and other articles of luxury. That he had become infatuated with a certain young [illegible] and [illegible] a [illegible] as the [illegible] time, and that he is providing for with the expectation of a home, and that he is maintaining her in luxury and recreation in the surroundings [illegible] that [illegible] by his [illegible]."

In [illegible] v. [illegible], 136 Ill. App. 301, in [illegible] the sufficiency of a bill for divorce, the court said (p.304): "The bill [illegible] that: 'the [illegible] the [illegible] time past, given himself over to adulterous practices and is now [illegible]

living an adulterous life.' This is only an averment of a conclusion, that defendant's life and practices were adulterous, not an averment that defendant had committed adultery, and is therefore insufficient. If the allegation could be held to amount to a charge that the defendant had committed adultery, it would still be insufficient because it fails to state the time, place, circumstances or the name of the person with whom such act of adultery was committed, or any excuse for the omission to state such particulars. 2 Bishop Marr. & Div., section 1325."

In the case at bar the bill was not demurred to by appellee, and its sufficiency is questioned for the first time on this appeal. If a demurrer had been interposed it would have had to be sustained. But the bill is not to be tested as if on demurrer. It is the rule, on appeal, that the pleadings are construed most strongly in favor of the pleader, and that every fair, reasonable intendment and presumption must be indulged to support the pleading. Wagner v. C. R. I. & P. Ry. Co., 277 Ill. 114, 119; Illinois Steel Co. v. Stonevick, 199 Ill., 182, 185; O'Rourke v. Sargul, 241 Ill. 576, 579, 580. When so considered the allegations in the bill were sufficient to charge adultery. The evidence, however, shows that there was a condonement by appellant.

The only evidence of any specific adulterous conduct on the part of appellee was an admission of appellee which was made to the Assistant State's Attorney in the Morals court when the Assistant State's Attorney effected a reconciliation between appellant and appellee. This was in February, 1922. The Assistant State's Attorney testified that appellee admitted to him that he, appellee, had had illicit relations with a young woman, naming her; that he "wanted to be through with her" and "be with his family;" that appellee asked him to see if he could arrange

a settlement with her for $500. The Assistant State's Attorney testified further that on this occasion appellant and appellee were "very affectionate" and that they "left very happy, arm in arm." According to appellant's own testimony there was a complete reconciliation. She testified that she and appellee "kissed and made up;" that he said, "What do you say, we will take a trip to Florida;" that she replied, "I haven't anything ready;" and he said, "Go over and buy anything you want and I'll pack up and call for the reservation and we'll go." Appellant said she thought "we were going on our second honeymoon." We are of the opinion there was a condonement by appellant of any adulterous conduct of which appellee may have been guilty. Hames v. Hames, 133 Ill. App. 665, 671.

Appellant admits that appellee provided well for his family; that she "never wanted for any money;" that she had "jewelry, furs, and other luxuries."

We are of the opinion that the decree of the chancellor was correct, and it is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McBurely, J., concur.

a settlement with the Jat Sikhs. The Jalandhar District Liberal Democratic Party that on this occasion objected to Jagjiwan was "very attractive" and that they "left very happy, one is sure." According to Jagjiwan's own sentiments there was a complete commitment. The Jagjiwan said the Jat Sikhs "stamped and made sure" that he said, "What ever you say, we will take a trip to Jalandhar" that our politics, "I thought something ready" and he said, "So stay and let Jagjiwan you wait and I'll back up and call for the reactivation and we'll go." Jagjiwan said she thought "we were going to our street campaign." He was of the opinion there was a commitment by members of any minorities members of which municipal any state was politic.

Jagjiwan v. Punjab, 1st 1st. Sep. 1st, 1st.

Jagjiwan stated that opposition practical well for the Janata Party that she "never voted for an party" just she had "Jawahir, Jan, and other leaders."

He was of the opinion that the change of the ruling party was correct, and it is activity.

Source [illegible].

Statewide, 1. 1., and Nationally, 1., source.

(3478a)

90 - 28366

HARRY A. HARRIS, Appellee, vs. LOUIS COHEN and PHIL COHEN, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO. 222 I.A. 214

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of the City of Chicago in favor of appellee for the balance of a loan which appellee claims was due to him from appellants. In his statement of claim appellee alleged that he made a joint loan to appellants. Appellant Louis Cohen in his affidavit of merits denied that appellee made a loan to him. Appellant Phil Cohen in his affidavit of merits denied that appellee lent him any money, but says that the money which appellee alleges to have lent to him was in fact invested in a business transaction in which he and appellee engaged as equal partners.

The evidence is conflicting. There are, however, undisputed facts which strongly corroborate appellee's version of the transaction. Appellants were brothers and Phil Cohen had his office with Louis. The money was received by appellant Louis Cohen, was receipted for by him, and was deposited by him to the credit of his firm, Louis Cohen & Topper. When appellee demanded payment of the loan, partial payments were made to appellee by checks signed by the firm name of Louis Cohen & Topper, and small cash payments were made by appellant Phil Cohen. In a letter appellant Phil Cohen states that the money was not a loan either to him or to his brother but was an investment by appellee in a partnership transaction, yet he also says that he is "trying to pay" appellee "in small payments," as appellee "is a poor man;"

[illegible] v. [illegible],
Appellant,

vs.

[illegible] and [illegible],
Appellees.

[illegible]

MR. JUSTICE [illegible] DISSENTING [illegible] OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of the City of Tucson in favor of appellees and the recovery of a loan which appellees claimed was due to them from appellant. In his answer of this appellant alleged that he made a joint loan to appellees. Appellees denied this in his affidavit of merits further that appellees made a loan to him. Appellees also denied the allegations of merits claiming that appellant had borrowed the money. We note that the money which appellees claimed to have lent to him was to first invested in a business transaction in which he and appellees engaged in joint ventures.

The evidence is conflicting. There is, however, undisputed fact which strongly corroborates appellant's version of the transaction. Appellees were holding the full sales price of his office with Jones. The money was received by appellees for Jones [illegible] for him, and was expended by him on the receipt of his items, which [illegible] a [illegible]. When considering documentary evidence of the [illegible], certain payments were made to appellees by [illegible] signed by the [illegible] of [illegible] [illegible] a [illegible], and small [illegible] were made by appellees [illegible]. In a letter appellees [illegible] stated that the money was not a loan either to him or to the [illegible] but was an investment by appellees in a partnership transaction, yet he also made it [illegible] to [illegible] "in small payments," or [illegible] "[illegible]

that he is "willing to pay" but "will have to ask for time;" that he does not think that appellee "could ever have a claim" if he Phil Cohen "would prove matters exactly," but that he Phil Cohen is "satisfied to shoulder the entire loss if given a little time." In a telegram to appellee, appellant Phil Cohen said: "Kindly have patience until I return. Do not bother Louis. I will be in a position to take care of you."

The principal contention of counsel for appellants is that there is a "material variance between the contract declared on and the contract proved." They maintain that the variance is caused by the testimony of appellee. They assert that on his direct testimony appellee testifies to one form of contract and that on cross-examination "reverses himself," and testifies to a contract which "is at best a direct loan" to appellant Phil Cohen; and that since the action is against appellants Louis Cohen and Phil Cohen jointly, appellee cannot recover.

It is true that in order that appellee may maintain his action he must establish by the evidence the joint liability of appellants; and if there is a material variance between the pleadings and the evidence in this respect appellee cannot recover. In our opinion, however, there is no variance. Assuming that counsel for appellants' contention that there is a direct conflict in appellee's testimony as to the nature of the contract, is correct, yet such a conflict would not constitute a variance between the evidence and the pleadings, but would only be a matter to be considered in determining the weight and credibility of appellee's testimony. In other words, if there are two different versions in appellee's testimony relating to the contract sued on, as counsel for appellants maintain, it would be necessary to decide which version, when considered with all of the evidence in the case, was the correct one. In our interpretation of

that he is willing to "buy" his freedom by not testifying." Counsel for appellee does not think that appellee "would ever have a chance" if he did testify. "Well, there certainly, - but that is only because he is "willing to consider the option been if given a little time." In a telegram to appellee, counsel for Phil Sohn said: "Finally have persuaded Gerald I remain. Do not worry unduly. I will be in a position to talk more at you."

The principal contention of counsel for appellants is that there is a "substantial evidence presents the conflict between on and the contrary evidence." They contrast this evidence as counsel by the testimony of appellee. They argue that on his direct testimony appellee unequivocally in one type of testimony and that on cross-examination "attempts identify," and "attempt to a question which "is at most a direct lower" to equivalent that Cohen; and that it shows the action is entirely speculative since Cohen not still been jointly, appellee cannot recover.

It is true that in order for a special jury to disbelieve the action be sure established in the evidence the joint liability of appellants; and if there is a substantial evidence supporting the plaintiffs and the evidence in this regard appellee cannot recover. In our opinion, however, there is no variance. Assuming that counsel for appellants' contention that there is a direct conflict in appellee's testimony as to the nature of the contract, is correct, yet such a conflict will not destroy a variance between the evidence and the pleadings, but would only be a matter to be considered in determining the weight and credibility of appellee's testimony. In other words, if there are two different versions in appellee's testimony relating to the contract upon, in counsel for appellants contention, it would be necessary to decide which version, when considered with all of the evidence in the case, was the correct one. In our interpretation of

appellee's testimony we do not think that there are two conflicting versions. The apparent conflict arises from the fact that although appellee took up the matter of the loan with appellant Phil Cohen first and with appellant Louis Cohen afterwards, appellee testified on direct examination to the conversation with appellant Louis Cohen and on cross-examination to the conversation with appellant Phil Cohen. In other words, he reversed the order of the conversations. Stated in detail appellee's testimony in this respect is as follows: On direct examination he testified to a conversation which he had on April 14 or 15, 1920, with appellant Louis Cohen in regard to the loan. He also stated that at that time he did not see appellant Phil Cohen. On cross-examination he testified that the first conversation he had in reference to the transaction was with appellant Phil Cohen in March, 1920. In that conversation he told appellant Phil Cohen he would lend him the money provided that appellant Louis Cohen "would be good for it." Appellee stated that after that conversation the transaction "dropped," and that "the next conversation was when" appellant Louis Cohen called him up, told him to "bring him that $2000;" that "he needed $2000." Appellee further testified that "there was no conversation between this first talk' that he had with appellant Phil Cohen and the conversation he had with appellant Louis Cohen. In our view the testimony of appellee on cross-examination harmonizes with his testimony on direct examination and the testimony on cross-examination does not show "a direct loan to Phil Cohen" alone, as counsel for appellants contend that it does.

Although we have considered the question of variance, we are of the opinion that the question was not properly saved for review. The record does not show that appellants made any objection to the evidence on the ground of variance, or made any motion to exclude the evidence on that ground. The rule of

appellee's testimony we do not think that there was the material-
ing previous. The appellant contends rather from the fact that
although appellee had an the motion of the loan with Lucy Lister
Phil Crane first and also appellee's only notice of foreclosure, appellee
testified on direct examination by the interrogation of his counsel
Louis Cohen and on cross-examination to the proceedings also
appellant said nothing. In other words, in reviewing the error of
the conversations. Judge in which appellee's testimony is this
respect is as follows: "In direct examination by counsel in a
conversation with he had on April 24 of 1, 1929, with appellant
Louis Cohen in regard to the loan. He also stated that at that
time he did not represent Phil Crane. On cross-examination
he testified that the Lucy Lister conversation had to do in reference to
the transaction [illegible] Phil Crane [illegible] 1929. In
that conversation he said appellant said [illegible] Lend him
the money provided that [illegible] Phil Crane [illegible] for
it." Appellee stated that after [illegible] the transaction
"dropped," and that this was conversation was "about appellant
Louis Cohen telling him not [illegible] Lucy Lister loan;"
that "he asked [illegible]." Appellee further testified that "there
was no conversation between this [illegible] Phil Crane
appellant Phil Crane and the conversation [illegible] Louis Cohen.
In our view the testimony of appellee in cross-
examination inconsistent with his testimony in direct examination
and the testimony on cross-examination was not sufficient to direct
loan to Phil Crane. Lucy, we conclude, by appellant stated
that it [illegible].

Although we have considered the question of evidence,
we are of the opinion that the question was not properly saved
for review. The record does not show that appellant made any
objection to the evidence in the course of trial, or made any
motion to exclude the evidence on that ground. The rule of

procedure is well settled that in order to present the question of variance for review, the record must show that the variance was specifically pointed out on the trial in some appropriate manner. Libby, McNeil & Libby v. Sherman, 146 Ill. 540, 549; Carney v. Marquette Coal Mining Company, 260 Ill. 220, 225; Thomas v. Chicago Embossing Company, 307 Ill. 134, 138, 139. In the case of Libby, McNeil & Libby v. Sherman, supra, it was held (p. 549) that even where a motion for a new trial stated that "there is a variance between the declaration and the proof" but failed to point out the variance, the objection was waived. Counsel for appellants contend that the question of variance is raised by their motion for a finding in behalf of appellant Louis Cohen, which was made at the close of appellee's case, and was renewed at the close of all the evidence. In our opinion the motion of appellants for a finding in their favor does not raise the question of variance, but only presents the question whether the evidence sustains the cause of action alleged by appellee. In support of their contention counsel for appellants rely mainly on the cases of Chicago Union Traction Co. v. Brethauer, 223 Ill. 524 and Smith v. Kewanee Light & Power Co., 196 Ill. App. 118. The quotation in the brief of counsel which is attributed to the case of Blakeslee's Express Co. v. Ford, 215 Ill. 230, should have been referred to the case of Chicago Union Traction Co. v. Brethauer, supra. The case of Union Traction Co. v. Brethauer, supra, does not hold that the question of variance may be properly raised by a motion to direct a verdict, but holds that the objection, which in that case was raised by a motion to direct a verdict and was termed a variance by counsel, presented "no other question" for the consideration of the court "than would be raised by the usual contention that the declaration is not sustained by the evidence." The question in that case was not considered by the court in connection with the rule governing variances. The

procedure is well settled that in order to present the question of variance for review, the record must show that the variance was specifically pointed out on the trial in some appropriate manner. Libby, McNeill & Libby v. [illegible], 222 Ill. 206, 209; [illegible] v. [illegible] Company, [illegible] Ill. [illegible]; [illegible] v. [illegible] Company, 227 Ill. 164, 169, 172. In the case of Libby, McNeill & Libby v. [illegible], supra, it was held (p. 209) that when a motion for a new trial stated that "there is a variance between the declaration and the proof" but failed to point out the variance, the objection was waived. Counsel for appellants contend that the question of variance is raised by their motion for a finding in favor of appellants made [illegible], which was made at the close of appellee's case, and was renewed at the close of all the evidence. In our opinion the motion of appellants for a finding in their favor does not raise the question of variance, but only presents the question whether the evidence sustains the cause of action alleged by appellee. In support of their contention counsel for appellants rely mainly on the cases of Chicago Union Traction Co. v. [illegible], 220 Ill. [illegible] and Smith v. [illegible] Light & Power Co., [illegible] Ill. App. [illegible]. The quotation in the brief of counsel which is attributed to the case of [illegible] Co. v. [illegible], [illegible] Ill. [illegible], should have been referred to the case of Chicago Union Traction Co. v. [illegible], supra. The case of Union Traction Co. v. [illegible], supra, does not hold that the question of variance may be properly raised by a motion to direct a verdict, but holds that the objection, which in that case was raised by a motion to direct a verdict and was beyond a variance [illegible], presented "no other question" for the consideration of the court "than could be raised by the usual contention that the declaration is not sustained by the evidence." The question in that case was not considered by the court in connection with the rule governing variances. The

court said that they were "only permitted to examine the evidence within the limitations of the rule" which related to objections that the proof does not support the declaration. In the case of Smith v. Kewanee Light & Power Co., supra, which is a decision of the Appellate Court of the Second District of Illinois, the court held that the variances in that case were of such a character that they could be presented on a motion to direct a verdict at the close of all the evidence. The court said (p. 121): "If there were material variances between all the proof and each count of the declaration, then there would be an entire absence of proof material to sustain the verdict, and such variances could be presented under a motion to direct a verdict at the close of all the evidence, because there would be no proof fairl tending to make appellee's case. Chicago Union Traction Co. v. Bretheuer, 223 Ill. 521. We shall therefore consider the supposed variances."

We think that the objections in the case of Smith v. Kewanee Light & Power Co., supra, which the court called variances, were incorrectly considered by the court as variances, and should have been considered merely as objections which presented the question whether the declaration was sustained by the evidence. The case of Chicago Union Traction Co. v. Bretheuer, supra, which was cited as authority by the court, does not in our opinion purport to change or modify the well established rule providing the manner in which the question of a variance may be saved for review on appeal. The distinction between the rule governing cases where there is a variance and the rule governing cases where there is "an entire absence of proof," should be preserved for the reason that, although there may be a variance when there is "an entire absence of proof," it does not always follow conversely that there will be "an entire absence of proof" when there is a variance.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

[illegible] that they were only [illegible] to evaluate the evidence within the limitations of the "rule" [illegible] to exclude that the proof does not violate the [illegible]. In the case of *Smith* v. *Illinois* [illegible] *Ill.*, which is a division of the Appellate Court of the Illinois District of Illinois, the court held that the testimony in this case was of such a nature that they could be prejudiced on a motion to direct a verdict of the close of all the evidence. The court said (p. [illegible]): "There were material variances between all the [illegible] and each count of the declaration, that there could be no [illegible] material to sustain the counts, and no verdict could be sustained under a motion to direct a verdict at the close of all the evidence, because there could be no proof [illegible] upon appellee's case. [illegible] *v. Brubaker*, [illegible] *Ill.* [illegible] 'a small [illegible] the [illegible] testimony.'"

In which case the defendant in the case of *Smith* v. *Chicago Joint [illegible] Corp.*, which was [illegible] material variance, was [illegible] by the court in [illegible], [illegible] have been considered [illegible] the question whether the [illegible] was [illegible] by the evidence. The case of [illegible] *v. [illegible]*, [illegible], was not [illegible] by the [illegible] port to change or modify the well established rule providing the manner in which the question of a [illegible] may be [illegible] on appeal. The [illegible] indicate the well [illegible] where there is a [illegible] and the rule [illegible] where there is the [illegible] character of proof, [illegible] be preserved for the reason that, although there may be a variance [illegible] the [illegible] evidence of proof," it does not always follow necessarily that there will be "an [illegible] theory of proof" where there is a variance.

For the reasons stated the judgment is affirmed.

AFFIRMED.

117 - 28393

(3471)

DAVID PRESTON,
Appellee,

vs.

FRANK WILKINSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

232

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of the City of Chicago on a verdict for $51.38 in favor of appellee. The action was brought by appellee for the balance due on the note of appellant payable to the order of appellee. The note of appellant was given in connection with an insurance transaction in which appellee acted as the insurance solicitor for the New York Life Insurance Company. On the material facts there is no substantial dispute. Appellant and appellee discussed a twenty year endowment policy with a disability and double indemnity clause. In arranging for the payment of the premium appellant gave his note to appellee. Later appellee delivered a policy of insurance to appellant and told him that the examination of appellant's urine showed sugar. Appellee told appellant that the rate would be increased, and requested appellant to sign a note for $78.34. The first note was destroyed and appellant gave appellee a note for $78.34 payable to the order of appellee. When the first note was given appellee explained to appellant that the note would have to be payable to appellee as the Insurance Company would not accept a note payable to the company; that the company held appellee responsible.

The policy of insurance which appellee delivered to appellant did not contain the clause for double indemnity and disability. There was a discussion about this. Appellant testified that he wanted to return the policy and to get back his note. The discussion ended, however, in appellant paying appellee $30

and keeping the policy. Appellant testified that he went to see the cashier of the company, explained the situation to him, and that the cashier said he would "get it fixed up." The cashier testified that he told appellant he had no control over the matter, but that he would do what he could for appellant.

It is admitted by appellant that he finally kept the policy and that he had it in his possession at the time that the action in the case at bar was commenced. Appellee paid the first premium on the policy to the company within the time required, and obtained the company's receipt for the payment. When the second premium became due appellant was notified. Appellee testified that he was the sole owner of the note.

The only ground on which counsel for appellant asks for a reversal of the judgment is that there was no consideration for the note.

In our opinion the contention of counsel is not sound. In consideration for the note appellant obtained a policy of insurance which was delivered to him and which he accepted.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

was keeping the policy. Appellant testified that he went to see the member of the company, calling the attention to it, and that the member said he said "yes it times up." The member testified that he talk appellant to find he started that the matter, but that he would do what he could for appellant.

It is admitted by appellant that he finally kept the policy and that he had it in his possession at the time the action in the case at bar was commenced. Appellee paid the first premium on the policy to the company within the time required, and obtained the company's receipt for the payment. When the second premium became due appellant was notified. Appellee testifies that he was the agent of the date.

The only ground on which counsel for appellant base for a reversal of the judgment is that there was no consideration for the note.

In our opinion the instruction of plaintiff in his behalf, in modification for the note appellant asked, a policy of insurance which was delivered to him and paid for received.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Mackbolt, P. J., and Doherty, J., concur.

152 - 28428

(3480)

HARTFORD FIRE INSURANCE CO.,
a Corporation,
Appellant,

vs.

LOUIS MALLERIS,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

232 I.A. 014

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought by the Hartford Fire Insurance Company in the Municipal court of Chicago against Louis Malleris, to recover an automobile in the possession of the defendant. A jury was waived and the cause was submitted to the court. The judgment of the court was in favor of the defendant. The plaintiff prosecuted the present appeal from the judgment.

The plaintiff claims that the automobile is one which was stolen from a man named Harry Lunken, and which had been insured by plaintiff against loss by theft. The plaintiff paid Lunken the amount of his insurance and took a bill of sale from him for the alleged stolen automobile. The principal question in the case is whether the finding of the court is manifestly against the weight of the evidence. This question narrows down to the issue whether the motor number on the automobile, 26154, was the original number or whether it had been changed from the number 27164, which was the motor number on Lunken's automobile. On this issue the evidence is directly conflicting.

Lunken purchased his automobile from the McVittie-Tisdale Company July 8, 1921. The McVittie-Tisdale Company was the agent of the Studebaker Company at Niagara Falls, New York, and received the automobile from the A. W. Haile Motor Company of Buffalo, New York, who were the distributors for the Studebaker Company in the territory which included Niagara Falls. The Studebaker Company shipped the automobile to the A. W. Haile Motor Company on June 14,

MARYLAND CASUALTY COMPANY,
a Corporation,
Appellant,

vs.

LOUISE SAMPSON,
Appellee.

APPEAL FROM BALTIMORE COURT
OF COMMON PLEAS.

MR. JUSTICE BOSLEY DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought by the Maryland Casualty Company in the Baltimore court of Common Pleas against Louise Sampson, to recover an automobile in the possession of the defendant. A jury was waived and the cause was submitted to the court. The judgment of the court was in favor of the defendant. The plaintiff appealed the verdict against it from the judgment.

The plaintiff stated that the automobile in controversy was stolen from a man named Harry Simons, and which had been insured by plaintiff against loss by theft. The plaintiff held lawful the account of the insurance and took a bill of sale from him for the alleged stolen automobile. The principal question in the case is whether the finding of the court in consistently against the weight of the evidence. This question arises upon the issue whether the motor number on the automobile, held, was the original number or whether it had been changed from the number 27124, which was the motor number on Simons's automobile. In this issue the evidence is directly conflicting.

Simons purchased his automobile from the Duryea-Niagara Sales Company July 2, 1918. The Duryea-Niagara Company was the agent of the Studebaker Company of Chicago Ills., New York, and received the automobile from the A. T. Duke Motor Company of Buffalo, New York, who were the distributors for the Studebaker Company in the territory which included Chicago Ills. The Studebaker Company shipped the automobile to the A. T. Duke Motor Company on the 2,

1921. The numbers on the automobile were as follows: Serial Number 331072; Motor Number 27164; Radiator Number 1069. On May 18, 1921, the Studebaker Company shipped another automobile of the same model and type to the Park Motor Company at Lewiston, Maine. This automobile was purchased from the Park Motor Company by the W. F. Knight Company of Norway, Maine, and sold to Guy W. Adams of Bridgeton, Maine, about June 6, 1921. Adams sold the automobile to Frederick Clark in September, 1922. Clark went to St. Petersburg, Florida. That is as far as the automobile was traced. The automobile had the following numbers: Serial Number 330077; Motor Number 26154; Radiator Number 806. The automobile in question, which was replevined by the plaintiff, had the following numbers: Serial Number 331072; Motor Number 26154; Radiator Number 1069. It will be observed that this automobile had the same <u>serial</u> number and the same <u>radiator</u> number as the automobile purchased by Harry Linken from the A. W. Haile Motor Company, the agent at Niagara Falls of the Studebaker Company; and had the same <u>motor</u> number of the automobile shipped to the Park Motor Company, the agent at Lewiston, Maine, of the Studebaker Company, and finally purchased by Frederick Clark. It is contended by the plaintiff that the serial number 331072 on the car in question, which was replevined by the plaintiff, is correct, but that the motor number 26154 is incorrect and should have been 27164, the same as the motor number on the automobile shipped to the McVittie-Tisdale Company at Niagara Falls and purchased by Lunken. From the testimony on both sides it appears that the motor number is the number mainly relied on in identifying automobiles by the numbers, for the reason that the motor number is imprinted on the motor by imbedding or depressing the numerals into the cast iron. It would be necessary to file the numerals in order to change them. The serial number and the radiator numbers are on plates which may be removed.

1923. The numbers on the automobile were as follows: Serial Number 111777; Motor Number 277621; Radiator Number 1000. On May 12, 1921, the Studebaker Company shipped another automobile of the same model and type to the Park Motor Company at Lewiston, Maine. This automobile was purchased from the Park Motor Company by the W. A. Poland Company of Norway, Maine, and sold to Guy T. Brown of Bethel, Maine, about June 6, 1921. Brown sold the automobile to Frederick Clark in September, 1922. Clark sold to M. Patenaude, Jr. That is as far as the automobile was traced. The automobile and the following numbers: Serial Number 111777; motor Number 221 M; Radiator Number 306. The automobile in question, which was replaced by the plaintiff, had the following numbers: Serial Number 111777; Motor Number 221M; Radiator Number 1000. It will be observed that this automobile had the same serial number and the same radiator number as the automobile purchased by Harry Brown from the W. A. Bailey Motor Company. The motor or engine block of the automobile Company; and had the same motor number as the automobile subject to the Park Motor Company, the agent at Lewiston, Maine, of the Studebaker Company, and finally purchased by Frederick Clark. It is contended by the plaintiff that the serial number 111777 on the car in question, which was replaced by the plaintiff, is correct, but that the motor number 221M is incorrect and should have been 277621, the same as the motor number on the automobile shipped to the Waldie-Tisdale Company at Eugene, Oregon and purchased by Lemoyne. From the testimony on both sides it appears that the motor number is the proper number which is identifying automobiles by the numbers, for the reason that the motor number is imprinted on the motor by machine or impressing the numbers into the cast iron. It would be necessary to file the numbers in order to change them. The serial number and the radiator numbers are on plates which may be removed.

The defendant testified that on December 16, 1921, he purchased the automobile in question from a man named Salabinger, with whom he was acquainted, and received a bill of sale from him for the automobile. The bill of sale was introduced in evidence. Salabinger, on behalf of the defendant, testified that he purchased the automobile from a man named Orr. Salabinger's testimony is not clear as to the time that he purchased the automobile, but he thought he purchased it in September, 1921. In his bill of sale to the defendant he states that he purchased the automobile from Orr on September 27, 1921. Salabinger testified that Orr resided at the time on Indiana avenue "near 48th street - 47 something;" that he went to his house to get him to testify, but that he had moved. Salabinger further testified that the reason that he sold the automobile to the plaintiff was because he could not afford to keep it, and also because he could not run it, as his eyes were bad; that he had had three accidents. Salabinger also testified that before he bought the automobile from Orr, he, Salabinger, drove the car for three or four weeks.

The defendant testified that before he purchased the automobile he told Alderman Agnew that he had an opportunity to buy it, and that Alderman Agnew told him to take the automobile over to the police department and have it investigated before he bought it. He further testified that he and Alderman Agnew drove over to the Detective Bureau, and that Sergeant Vaughn and two patrolmen, Klaus and Christensen, examined the automobile; that Klaus and Christensen examined it again at the Graham & Morton dock in the presence of Alderman Agnew and himself.

Alderman Agnew testified, in behalf of the defendant, substantially the same as the defendant. Sergeant Vaughn testified, in behalf of the defendant, that he was present when the examination was made at the Detective Bureau. Patrolman Christensen testified, in behalf of the defendant, that he and Patrolman [illegible]

The defendant testified that on December 15, 1951, he purchased the automobile in question from a man named Dalbinger, with whom he was acquainted, and received a bill of sale from him for the automobile. The bill of sale was introduced in evidence. Dalbinger, on behalf of the defendant, testified that he purchased the automobile from a car dealer. Dalbinger's testimony is not clear as to the time that he purchased the automobile, but he thought he purchased it in December, 1951. In the bill of sale to the defendant he stated that he purchased the automobile from Orr on September 27, 1951. Dalbinger testified that Orr towing at the time on Indiana avenue "near 11th street - 12 something;" that he went to his house to get him to testify, but that he had moved. Dalbinger further testified that the reason that he took the automobile to the dealership was because he could not afford to keep it, nor also because he claim that from it, it was dirty bad; that he had had three accidents. Dalbinger also testified that before he bought the automobile from Orr, the dealer, drove the car for three or four years.

The defendant testified that before he purchased the automobile he told Alderson Agnew that he did not be responsible to buy it, and that Alderson Agnew told him if he drive over to the police department and have it [illegible] before he bought it. He further testified that he and Alderson Agnew drove over to the Detective Bureau, and that Sergeant Vaughn and two patrolmen, Klunz and Christensen, examined the automobile; that Klunz and Christensen examined it again in the Grand Central lock in the presence of Alderson Agnew and himself.

Alderson Agnew testified, in behalf of the defendant, substantially the same as the defendant. Sergeant Vaughn testified, in behalf of the defendant, that he was present when the examination was made at the Detective Bureau. Patrolman Christensen testified, in behalf of the defendant, [illegible]

the automobile at the Detective Bureau; that the first thing they did was to look at the motor number; that the original paint was on the block where the number was; that they scraped the paint off and examined the motor number very closely; that they examined the serial number; that they then looked through the files at the Detective Bureau relating to stolen cars in and outside of the city. Christensen explained why an examination of the paint was made and described the test used in determining whether it was the original paint. He stated that the paint was the original paint and that the motor number 26154 was the original motor number.

Patrolman Klaus testified in behalf of the defendant in regard to the examination that he made with Christenson at the Detective Bureau. His testimony is substantially the same as Christensen's. He testified that the motor number 26154 appeared to him to be the original number; also that the paint on the motor, where the number appears, seemed to him to be the original paint. After the examination of the automobile by Christensen and Klaus at the Detective Bureau they wrote a letter to the Studebaker Company, giving the company the numbers of the automobile. In reply the Company wrote the following letter:

"Answering your letter of December 14 regarding Studebaker car bearing motor number 26154 and serial number 331072. On checking up we find that the above numbers belong to two different Studebaker cars. Serial number 331072 corresponds to motor number 27164, while motor number 26154 corresponds to serial number 330077. Serial number 331072 with motor number 27164 was sold on July 8, 1921, by McVittie & Tisdale, our Niagara Falls, N. Y. dealer, to Harry Linkon, 1206 E. Falls St., Niagara Falls. Serial number 330077 and motor number 26154 was sold by our dealer to the Park Street Motor Corporation of Lewiston, Me., to Mr. G. W. Adams, a farmer living near that place. If you don't get anywhere in checking up on this information, we suggest that you let us have

The authorities at the Detective Bureau, that the first thing they did was to look at the motor number. Then the original order was on the block where the number was; then they removed the plate and examined the motor number very closely; that they examined the serial number; that they then turned around the title as the Detective Bureau relation to which were in the outside of the city. Christensen explained why an examination of the block the code was described the test used in determining motors is the engraved plate. He stated that the point was the original motor and that the motor number 32131 was the original motor number.

Fairchild Stone testified that in regard to the information in regard to the examination then to make only conversation in the Detective Bureau. His testimony is substantially the same as Christensen's. He identified the motor number 32131 contained in the motor number 32131 contained number; also took the motor to the garage, where the motor was seen, removed to the so on the original motor. After the communication of the authorities by Christensen and Stone at the Detective Bureau they made a letter to the Inspector General, giving the history the numbers of the motorcycle. In reply the Inspector wrote the following letter:

"Referring your letter of December 14 regarding Harley-Davidson motor number 32131 and serial number 11172, in answer to the fact that the above numbers belong to the Triumph Corporation here. Serial number 11172 corresponds to motor number 6124, while motor number 32131 corresponds to serial number 11077. Serial number 11172 with motor number 6124 was sold on July 6, 1920, by Cycle Exchange, Los Angeles Calif., to T. Hewitt, 10 Every Lane, 1200 S. Main St., Los Angeles Calif. Serial number 11077 and motor number 32131 was sold by our dealer in the year Great Bear Corporation of Lansing, Ia., to Mr. T. Adams, a farmer living near that place. If you don't get report in checking up on this information, we suggest that you let us know

the starter and generator numbers of the car you are holding, and we will then make further comprisons of numbers. We mention this on account of the fact that the numbers on the car you are holding may have been altered."

After receiving the letter from the Studebaker Company Christensen and Klaus made the examination of the automobile in front of the Graham & Morton dock previously referred to. The plaintiff and Alderman Agnew were present. They found the motor number in the same condition as when they made the examination at the Detective Bureau.

Subsequently, in February, 1932, the defendant was called up by Patrolman Klaus and was told to bring the automobile to the Detective Bureau as the "Insurance people" wanted to examine it. On this occasion another examination was made by Sergeant Vaughn, Patrolman Christensen and an Insurance Adjuster named Whitney, representing the plaintiff.

Whitney testified that the condition of the motor number showed that it had been changed; that filing marks appeared about the "5" which showed "a swing of some other number;" that he could not make out that number; that the portion upon which the motor numerals appeared had been filed down; that the original numbers were not entirely obliterated by the filing. Whitney also testified that the letters "CG" appeared on the motor and that the letter "G" was not as clear as the letter "C." Whitney further testified that he pointed out the discrepancies at that time generally; that he called both Vaughn's and Christensen's attention to "the apparent defect in the numeral '5'" and to the appearance of file marks; that Vaughn said that "it was a good change if it was changed;" that Christensen made a similar remark, and also said that the motor did not belong in the automobile; that it was another motor and not the original. Whitney further testified that from his

the starter and generator numbers if the car did are matching, and we will then make further inquiries if required. In reading this on account of the fact that the numbers on the car you are noticing may have been altered."

After receiving the letter from the Chief Constable Chatterson and Clarke made the examination of the Lancaster in front of the Grahame & Morton that previously referred to. The identity and Alistair Agnew were present. They found the motor number to the most unlikely as how they made the identification at the Detective Office.

Subsequently, in February, 1927, the Lancaster was seized up by Portobee Clarke and was made to prove the ownership to the Detective Bureau of the Metropolis Police Office to examine it. On this occasion another complication was with by Sergeant Vaughn, Particular Detectives and a newspaper Minister named Whitney, concerning the identity.

Making testimony that the condition of the motor number showed that, it had been deliberately that filed, which indicate that the "8" which showed "a motor of more than" that he could not make out that number; but the motor that which the Detective numerals appeared had been filed down, that the original numbers were not entirely obliterated by the filing. Whitney also identified that the letters "GT" appeared on the motor and that the letter "G" was not as clear as the letter "C." Whitney further stated that he noticed that the dimensions of that letter particularly that he called both Vaughn's and Chatterson's attention to "the difference exist in the numeral '8'" and to the consequence of this evidence; that Vaughn said that "it was a very change if it was changed;" that Chatterson made a similar remark, but also said that the motor did not belong to the automobile; that it was another motor and not the original. Whitney further testified that his

examination of the serial number, the plate and the radiator number, he was of the opinion that they had never been changed, altered, tampered with or removed from the automobile; that when he went with Vaughn and Christensen to examine the automobile he had the serial, motor and radiator numbers in a letter of the defendant, and that he "told these numbers" to Vaughn. Whitney further testified that Vaughn made "a minute examination of the numbers" on the automobile; that Vaughn and Christensen used "a drop light" and he believes "a magnifying glass." Whitney also testified that he did not tell Vaughn in the presence of the plaintiff that the numbers had not been tampered with, and did not say that "evidently that was not the car" that he "was looking for." Whitney further testified that he demanded the car of the plaintiff at that time in the presence of Christensen and Vaughn; that he also made a demand on the officers; that Vaughn said he "could not turn it over" to him, Whitney, "because those were plate numbers;" that he, Whitney, could trace additional assembly records, and that he, Whitney, would have to do it; "otherwise the only thing left for him, Whitney, to do was to replevin the car." Whitney further testified that he, Whitney, thought it "was our car" from the numbers, and what he, Whitney, could see of the monogram on the body; that the plaintiff "produced a bill of sale which he stated he had obtained; that the bill of sale was sufficient and the automobile was his. It will be observed in considering Whitney's testimony in regard to the change of the numerals on the motor number that he does not state that they were changed from 27164 to 26154.

Vaughn testified that when he, Christensen and Whitney examined the automobile they examined the motor number and the serial number and took off what is called the assembly record; that the "motor number is mostly what we go by;" that the "serial plate means nothing;" that "the serial number can be removed from one car to another;" that he said that he was satisfied that the motor number

examination of the serial number, the plate on the radiator number, he was of the opinion that they had never been changed, altered, tampered with or removed from the automobile; that when he went with Vaughn and Christiansen to examine the automobile he put the serial, motor and radiator numbers in a letter of the alphabet, as that he "told them numbers to Vaughn. Whitney further testified that Vaughn made "a minute examination of the numbers" on the letter-file; that Vaughn and Christiansen went "a long ways" and he believes "a wrecking car came." Whitney also testified that he did not tell Vaughn in the presence of the minister that the numbers had not been changed with, and did not say that "strictly and was not the car" that he "was looking for." Whitney further testified that he searched the car of his client at that time in the presence of Christiansen and Vaughn; that he also made a demand on the officers; that Vaughn said he "will let him take it over" to him, Whitney, "because there are plate numbers;" that he, Whitney, could trace additional assembly records, and that he, Whitney, would have to do it; "otherwise the only thing left for him, Whitney, is to go and to receive the car." Whitney further testified that he, Whitney, thought it "was out of" from the numbers, and that he, Whitney, could see of the numbers on the body; that the plaintiff "produced a bill of sale which he stated he had obtained; that the bill of sale was sufficient and the automobile was his. It will be observed in considering Whitney's testimony in regard to the change of the numerals on the motor number that he has not stated that they were changed from EVIS to SMIS.

Vaughn testified that when he, Christiansen and Whitney examined the automobile they examined the motor number and the serial number and took off what is called the assembly record; that the "motor number is mostly what we go by;" that the "serial plate means nothing;" that "the serial number can be removed from one car to another;" that he said that he was satisfied that the motor number

had not been changed; that Whitney "said the same." Vaughn further testified that a rough casting was on the motor number, which showed that it had not been tampered with; that "there is a rough finish on the original number and that if the number had been changed or filed it is smoothed off;" that "if it has been restamped you can tell by the figures - they are put on a smooth surface;" that the "number is stamped in on the top of the die;" that the number is connected with the motor; that when he said that the surface is rough, he meant that the surface where the number appears is similar in appearance to the rest of the motor block; that he based his opinion that the number was not changed and that it was an original number on his "seven years' experience." He further testified that Whitney did not point out to him that the figure "5" had been changed or tampered with in any manner; that he, Vaughn, does not remember that Whitney said anything to him about one of the numbers appearing to have been changed; that his, Vaughn's, recollection is that Whitney agreed with him that the motor number had not been changed; that if his "memory serves him right" Whitney said the "car they lost was 1920," and that the one they were examining "was a 1921 car;" that Whitney showed him some documents containing some numbers, but that he does not remember what they were. Vaughn further testified that he did not hear Whitney make a demand of the plaintiff for the automobile; that he did not hear the plaintiff say to Whitney that he, the plaintiff, "bought this car by a bill of sale from a party who is all right and that I won't give it up."

Christensen testified in regard to the examination of the automobile by himself, Vaughn and Whitney. He stated that he said to Vaughn, "that is the original motor number;" that Vaughn said, "What do you think, Mr. Whitney?" and that Whitney said, "It looks good to me - I do not think that is the car we are looking for;" that he did not hear Whitney say to anyone present

had not been wanting; that Ed may "make the game." Vaughn Fur-
ther indicated that a small dwelling was on the outer monument, which
should that it had not been mentioned with that there is a single
field in the original manner and that if the members are then
thanked or there is no mention of; then "If it has been re-
stamped you can tell by the clamps - (Ay, the old is a modern
mystery;" that the "monster" is standing in on the log of the old;"
that the monster is connected with the mother; that they be said
that the particular is again, he might find the outside there the
member monument is plainly to distinguish it but over of the white
block; that he based his opinion that the monument was not changed
and that it was an original monument on his "years years experi-
ence." Mr Carter testified that Whitney did not point out to
him that the figure "if has been changed or lengthened in any
manner; that as, Vaughn, then all remember that Whitney was an-
thing to the about one of the modern monuments in more than
amazed; that his, Vaughn's, recollection is that Whitney agreed
with him that the outer monument was not been changed; that, if the
"mystery marks the right" Whitney said the "has long ago now left,"
and that the man they were remaining "was a little out;" that Whitney
showed his some documents certificates made elsewhere, but that he came
not remember what they were. Vaughn further testified that he
did not hear Whitney make a demand of the plaintiff for his con-
tribution; that he did not hear the plaintiff say to Whitney that
he, the plaintiff, "would this car of a mill or make them a
party who is all in the day that I want them to up."

Cross-examined testified it refers to the boundaries of
his ancestors by himself, Vaughn and Whitney. He stated that he
said to Vaughn, "that is the original outer monument;" that Vaughn
said, "what do you think, is, Whitney" and that Whitney said,
"It looks quite to me - I do not think that it can say on one
looking for;" that he did not hear Whitney say to Vaughn "monu-

that that was the car he, Whitney, was looking for; that he did not hear Whitney make any demand of Vaughn, Malleris or himself for the car; that at this time the motor number was in the same condition as when he, Christensen, examined it at the Graham & Morton dock.

The defendant testified that after Whitney, Vaughn and Christensen had examined the automobile, he heard Whitney ask Vaughn, "What model is this car?" and that Vaughn said, "1921;" that Whitney said, "This is not our car; we are looking for a 1920;" that he, the defendant, saw Vaughn "point out the numbers on the motor block," and that Whitney said he "was satisfied" that those were "original numbers on this motor." The defendant further testified that Whitney did not at any time "demand that car from" him; that he did not hear Whitney demand possession of that car from either Vaughn or Christensen. Whitney denied having made any of the statements attributed to him by Vaughn, Christensen and the defendant.

Another examination of the automobile was made by Whitney, Vaughn, Christensen and Klaus during the trial of the case at bar in the presence of the court. Vaughn testified that on this examination the motor number was not in the same condition that it was in February, 1922, when he examined it with Whitney; that he, Vaughn, found that the motor number had been filed down; that the rough surface on the corner where the number appeared was not there; that two "C's" before the motor number had been "almost cleared off;" that the figures of the motor were arranged the same with the exception of being filed a little bit; that they were "staggered" in February, 1922, as they are now; that perfect alignment of the numbers means not ing - they are liable to be up and down, in and out; that he does not go by that; that the number he is "most suspicious of is the number that is perfectly in line."

Christensen testified, in regard to the examination

that that was the end on, Tolkien, was insisting too; that he did not
hear Tolkiens voice any trace of Tangle, Valinor or elsewhere for
the end; that at this time the major problem was in the final consid-
ation as very it, Tolkiens, considered it a the to give a Bolton
book.

The relationship implicit here after history, Tangle
and Christopher's is therefore the antecedent, so being Tolkiens
and Tangle. "Who could is this city" and that Tangle said,
"Ion;" that Tolkiens said, "This is not and- and we are leaving
for a Ion;" that is, the relationship, and Tangle "this not too
monsters on the minor Tlonq," and that Tolkiens said to "our realis-
tic" that there were "religious monsters in his minor." The relation-
ship further said that Tolkiens it not or any time "personal
that our from" this that he lit his city Tolkiens (minor visualization
of that and from "other Tangle of Tlonqiens). Tolkiens Tangle Sum-
ing made any of the minor's particular a who be Tangle, Tolkie-
tension and its information.

Another assignment of the antecedents and with by
Tolkiens, Tangle, Christopher and Alone Tolkiens the text or the
come a her in the presence of his text. Tangle hesitated that
on this revelation the meter Tolkiens was not in the same condition
that it was to Tlonqiens, Ion;, when he examined it with Tolkiens;
that is, Tangle, found that the minor Tlonqiens had some time same:
that the Tlonqiens meters at the meter Tlonqiens the meter presented
was not there; that he "is" Tolkiens before the meter Tlonqiens had been
"almost alone;" that the Tlonqiens of the meter Tolkiens are returned
the meter with the meter of Tolkiens Tlonqiens a little; that that Tlonq
were "alone" in "Tlonqiens," Ion;, as that are meter; that certain
Tlonqiens or the meters Tlonqiens meter Tlonqiens - that are Tlonqiens is so
in and Tlonqiens, in and out; that in "are not in by that; that the
another Tlonqiens is "meter Tlonqiens" or in the Tlonqiens that is particular
in time."

Tolkiens Tlonqiens Tlonqiens, in Tlonqiens is the Tlonqiens

made during the trial, that he noticed changes in the motor number since he examined it in February, 1922; that he found that three of the numerals of the motor number had been tampered with; that the numerals were "2," "6" and "4;" that there had been a "stamp put over them and knocked down further;" that they were depressed into the casting further than the others, and that the "1" and the "5" and the two letters in front were higher than these; that the letters were almost indistinct - filed down a good deal."

Klaus' testimony in regard to his examination of the automobile during the trial is substantially the same as that of Vaughn and Christensen. Klaus testified that he found file marks on the motor; that when he examined it previously in February, 1922, he looked particularly for file marks but found none.

Whitney testified that on his examination of the automobile during the trial he found that the condition of the motor number was the same as when he examined it in February, 1922; that the serial number and the radiator number were in the same condition also.

Hill, "an automobile estimator," testified in behalf of the plaintiff that he examined the automobile during the trial and that the part upon which he found the "motor number had all the appearance of some previous number having been filed off;" that there were indications of file marks of two letters; that they had been filed about half away; that the "numbers were staggered and not put on with regularity that a factory is accustomed to do business;" that he examined the serial number closely and that he does not think the plate ever had been removed.

The evidence shows that the automobile was replevined by the plaintiff in September, 1922; and that it had been in the possession of the plaintiff from that time up to and including the time when it was examined during the trial of the case at bar.

made during the trial, that he noticed changes in the motor number plate he acquired it in February, 1972; that he found that three of the numerals of the motor number had been tampered with; that the numerals were "3," "0" and "4;" that there had been a "bump put over them and appeared fresh further; that they were depressed from the casting further than the other, and that the "3" and the "4" and the two letters in front were slighter than those; that the letters were almost indistinct - filed down a good deal."

Slater's testimony in regard to his examination of the automobile before the trial is substantially the same as that of Vaughn and Martenson. Slater stated that he found "fresh marks on the motor; that when he examined it originally in February, 1972, he looked particularly for file marks but found none.

Tolmoy testified that on his examination of the automobile during the trial he found that the condition of the motor number was the same as when he examined it in February, 1972; that the serial number and the validator number were in the same condition also.

Hill, "an automobile mechanic," testified on behalf of the plaintiff that he examined the automobile during the trial and that the part upon which he found the "motor number had all the appearance of some previous number having been filed off;" that there were two sections of file marks of the letters; that they had been filed about half way; that the "numbers were disjointed and not put on with regularity that a factory is accustomed to do business;" that he examined the serial number closely and that he was not their the plate was not some number.

The evidence shows that the defendant, the insurance by the plaintiff in September, 1972; and that it had been in the possession of the plaintiff from that time up to the date involving the fire when it was examined during the trial of the case at bar.

The evidence also shows that the first attempt of the plaintiff toward recovering or claiming the automobile was made in February, 1922, when Whitney examined the car with Vaughn and Christensen in the presence of the defendant. The plaintiff showed by a witness, Campbell, the agent for the plaintiff at Portland, Maine, that in March, 1922, Campbell, at the request of the plaintiff, examined the motor number of the automobile which was purchased by Adams from the W. F. Knight Company, agent for the Studebaker Company at Norway, Maine, and afterwards sold by Adams to Clark. The examination of the motor was made by Campbell while the automobile was in the possession of Adams. Campbell testified that he actually inspected the motor number; that the motor number was the number he was asked to get; that he thinks that he examined the serial number, but that he made no memorandum of it; that he has no recollection of the serial number; that the motor number was "C G - 26154;" that the motor number bore no indication of alteration.

Adams testified in behalf of the plaintiff that he knew the number of the motor of his automobile; that "as near as" he remembers it was 26154; that he was present when Campbell made his examination; that Campbell took the number 26154 as he remembers; that he, Adams, "could not exactly tell if I am able to remember the serial number;" that he thinks the last two figures were sevens, but that he is not quite sure of that; that he and Campbell examined the serial number and that the serial number plate bore no evidence of having been tampered with.

The serial number of the automobile alleged to have been stolen from Harry Lunken was the only number in the insurance policy issued by the plaintiff to Harry Lunken. The plaintiff attempted to show by Harry Lunken the numbers that were on his automobile, and also introduced an affidavit of Lunken, in which Lunken stated the numbers. In his testimony Lunken tried to

The evidence also shows that the first attempt of the plaintiff towards registering or claiming the automobile was made in February, 1913, when Tatlow secured the two bill forms and obtained the signature of the defendant. The plaintiff proved by a witness, Campbell, the agent for the plaintiff as referred, below, that in March, 1913, Campbell, at the request of the plaintiff, examined the motor number of the automobile which had purchased by James from the W. J. Middle Company, ready for the timekeeper company of Toronto, Ltd., and afterwards said by James to Clark. The examination of the motor was made by Campbell with the automobile was in the possession of James. Campbell testified that he actually transcribed the motor number; that the motor number was number he was asked to get; that it was that he obtained the serial number, but that he made no construction of it; that he did no modification of the serial number; that the serial number was "A 4 - 12131;" that the motor number was 12131 - 12131; that the motor number was a combination of numbers and letters.

James testified in behalf of the plaintiff that he gave the number of the motor of his automobile; that the number was be transferred it was 12131; that he was present when Campbell made his examination; that Campbell said to the engineer: that Campbell said, if I am wrong in transfer the serial number;" that he or James the last two figures were seven, but that he is not quite sure of that; that he and Campbell examined the serial number and that the serial number plate here is evident of having been tampered with.

The serial number of the automobile alleged to have been stolen from Harry Lumsden was his only number in the instrument solely issued by the plaintiff to Harry Lumsden. The plaintiff attempted to show by Harry Lumsden the numbers that were on his automobile, but was interrupted as efficacy of Lumsden, to which Lumsden replied the numbers. In his testimony Lumsden stated as

explain how he was able to state the numbers in the affidavit, but his testimony is very uncertain and contradictory.

Eugene Lunken, the son of Harry Lunken, testified that he wrote the serial and the motor numbers of the automobile on a piece of paper when the insurance policy was taken out; that he does not remember where the paper is now; that he does not remember the motor number; that he was able by refreshing his memory from the affidavit made by his father to tell what these numbers were; that the serial number was 331072 and the motor number was 27164; that the ignition key number was 45.

A police officer named Seeger testified for the defendant that he was present when the writ of replevin was served on the defendant; that at that time he had a conversation with a man who represented himself as being from the plaintiff; that he is able to describe the man; that he, the witness, asked the man: "Are you sure this car was stolen?" that the man said that he was, and that the car was stolen in New York; that he, the witness, asked the man further: "Are you sure you got the number of that car?" and that the man replied, "The engine that belongs on this car is down in Maine;" that he, the witness, said, "You are not identifying a car by the body."

From a consideration of the evidence we are of the opinion that the finding of the trial court that the right to the possession of the automobile was not in the plaintiff is not manifestly against the weight of the evidence. If the testimony of Salabinger is accepted as true, it is conclusive of the controversy. He testified that he bought the automobile that he sold to the defendant from Orr on September 27, 1921, and that he, Salabinger, rode in it for about three or four weeks before he bought it.

According to the evidence Lunken's automobile was stolen September 21, 1921, and from July 8, 1921, to September 21, 1921,

explain how it was able to state the numbers in its affidavit, but his testimony is very uncertain and contradictory.

Joseph Lawson, the son of Harry Lawson, testified that he wrote the serial and the motor numbers of the automobile on a piece of paper when the insurance policy was taken out; that he does not remember where the paper is now; that he does not remember the motor number; that he was able by referring his memory from the affidavit made by him further to tell what those numbers were; that the serial number was 2A3272 and the motor number was V7126; that the ignition key number was 42.

A police officer named Yeager testified for the defendant that he was present when the writ of replevin was served on the defendant; that at that time he had conversation with a man who represented himself as being from the insurance; that he is able to describe the man; that the witness, taking it was: "Are you sure this car was stolen?" that the man said that he was, and that the car had stolen in New York; that he, the witness, asked the man further: "Are you sure you got the number of that car?" and that the man replied, "You mention that belonge to this car is down in Maine;" that he, the witness, said, "You are not identifying a car by the body."

From a consideration of the evidence we are of the opinion that the finding of the trial court that the right to the possession of the automobile was not in the claimant is not manifestly against the weight of the evidence. If the testimony of Schlesinger is accepted as true, it is questionable if the conversion was in fact in the defendant Free prior to September 27, 1921, and that the claimant, took in it for about three or four weeks before he bought it.

Referring to the original Duncan's automobile was stolen September 21, 1921, from July 8, 1921, to September 21, 1921,

it had been continuously in his possession. It would follow that Salabinger purchased the automobile he sold to the defendant while Lunken's automobile was still in Lunken's possession and before it had been stolen from Lunken. But even if Salabinger's testimony is rejected, we do not think that the finding of the trial court should be disturbed. Parts of the testimony for the plaintiff are unsatisfactory. Plaintiff knew in February, 1922, when Whitney examined the automobile in company with the police officers, that the automobile was in the possession of the defendant, and that the defendant claimed to be the owner. On March 22, 1922, Campbell, the agent of the plaintiff at Portland, Maine, examined Adam's automobile, and reported that the motor number was 26154. Yet the plaintiff waited until September 27, 1922, before suing out the writ of replevin. In the meantime, on September 22, 1922, Adams sold his automobile to Clark, who subsequently took it to Florida. Furthermore, when Campbell examined Adams' automobile he obtained only the motor number. He did not make a record of the serial number and did not recollect the number. He was only asked to get the motor number. Adams did not know the serial number. He thought the last two numerals were "77." It must be borne in mind that in the case at bar the plaintiff is claiming that it is lawfully entitled to the possession of the automobile. It can only recover therefore on the strength of its own right of possession, and not on the weakness of its adversary. Holler v. Coleson, 23 Ill. App. 324, 330; Perfect Knitting Mills v. Obstfeld, 154 Ill. App. 637.

The main ground, however, on which we refuse to set aside the finding of the trial court is that the evidence is directly conflicting on the material issues. The rule is a familiar one that where "there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be against the apparent weight of the evidence, a reviewing court

it had been wantonness in the prosecution. It would follow that defendant procuring the automobile be held to the defendant with Burton's automobile was still in Benson's possession and before it had been stolen from Jackson. But even if defendant's testimony is rejected, we do not think that the finding of the trial court should be disturbed. Proof of the existence of the plaintiff's ownership. Plaintiff came to Fairway, 1973, when Gilbert requested the automobile in question with the police officers, that the automobile was in the possession of the defendant, and that the transmission disclosed to be the same. On March 21, 1974, Benson, the owner of the plaintiff in Kansas, Kansas, acquired Gilbert's motorbike, and received that the motor number 7812. For the plaintiff until Gilbert September 7, 1976, before being sold the wife of replevin. In the meantime, on September 19, 1976, whom said his motorbike to first, was subsequently took it to Florida. Furthermore, when Campbell received clear automobile he obtained only the motor number. He did not make a record of the serial number and it not receipt the number. He was only able to get the motor number. Johnson did not know the serial number. He thought the last two numbers were "77." It seems to have in mind that in the case at bar the plaintiff is obvious that it is invalid evidence to the possession of the automobile. It can only resume therefore on the strength of the own right of possession, and not on the weakness of the warranty. Bailey v. Gleason, 23 Ill. App. 324, 326; Clifton Building Bank v. Wheeler, 124 Ill. App. 629.

The main ground, however, on which we believe is not made the finding of the lower court is that the evidence is clearly conflicting on the material issues. The rule is a familiar one that where there is a conflicting of evidence and the testimony by fair and reasonable inferences will sustain the verdict, even though it may be against the weight of the evidence, a reviewing court

will not set it aside." Carney v. Sheedy, 295 Ill., 78, 83. To the same effect are the following cases: I. C. R. R. Co. v. Gillis, 68 Ill., 317, 319; Bradley v. Palmer, 193 Ill., 15, 89. It is also the rule that a verdict will not be disturbed merely because the evidence is doubtful. I. C. R. R. Co. v. Cowles, 32 Ill., 116, 121; DeForrest v. Oder, 42 Ill., 500, 501. It is hardly necessary to state that the finding of a court is entitled to the same weight and consideration as the verdict of a jury. Fisk v. Henning, 169 Ill., 105, 108. We have set out the testimony at length on the controlling issues in the case, and the conflicts are so direct and obvious as not to require any discussion.

It is contended by counsel for defendant that the affidavit of Lunken and certain other evidence for the plaintiff was inadmissible. As no cross-errors have been assigned by counsel, the rulings of the court have not been saved for review. Forcum v. Brown, 251 Ill., 301, 315; Stowell v. Spencer, 190 Ill., 453, 454. Furthermore, since it is our opinion that the judgment should be affirmed, it is not necessary to consider the objections in regard to the evidence; nor is it necessary to decide the question whether a demand was made or was necessary.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

will not set it aside." Gainey v. Gainey, 98 Ill., 98, 99. To the same effect are the following cases: I. C. R. R. Co. v. Gillis, 82 Ill., 317, 320; Trahey v. Cahey, 141 Ill., 14, 19. It is also the rule that a verdict will not be disturbed merely because the evidence is conflicting. I. C. R. R. Co. v. Keegan, 73 Ill., 116, 121; Pennsylvania v. Dent, 49 Ill., 444, 451. It is hardly necessary to state that the finding of a jury is entitled to the same weight and consideration as the verdict of a jury. Ziegler v. Hopkins, 140 Ill., 255, 264. We have not set the testimony at length on the controlling issues in the case, and the conflicts are so direct and clear as not to require any discussion.

It is contended by counsel for defendant that the affidavit of Dodson and certain other evidence for the plaintiff was inadmissible. As no cross-errors have been assigned by counsel, the rulings of the court have not been saved for review. Lorenz v. Lorenz, 181 Ill., 324, 327; Schmidt v. Schmidt, 170 Ill., 422, 424. Furthermore, since it is our opinion that the judgment should be affirmed, it is not necessary to consider the objections in regard to the evidence; nor is it necessary to review the question whether a counsel fee ought or not be allowed.

Judgment affirmed.

Wolfenbarger, P. J., and Dobrovolny, J., concur.

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(3401a)

A. R. BARNES & CO., a Corporation,
Appellee,

vs.

CHICAGO, RACINE & MILWAUKEE LINE,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

232 I.A. 514

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The appeal in this case is from a judgment of the Municipal court of the City of Chicago on a verdict in favor of appellee, A. R. Barnes & Company, a corporation, for $1150. The action was begun by appellee. The statement of claim alleges that appellant is indebted to appellee for certain forms of expense bills printed and held for delivery by appellee for appellant at appellant's special instance and request.

The gist of appellant's defense is that the printed forms in question were printed on appellee's "own volition and responsibility," without any request by appellant, in accordance with a custom extending over a number of years, whereby appellee would print and keep in stock forms such as expense bills and waybills appropriate for the use of appellant; from this stock appellant had the right to order such quantities as and when it chose and pay for the same when delivered.

The evidence shows that appellant and appellee had been doing business together for about twenty years continuously. During this time appellee printed all of the expense bills and waybills that appellant ever used. The custom was for appellee to try to estimate annually the probable amount of forms appellant would need for a year and to print that amount. These forms were kept in stock by appellee and were delivered to appellant on appellant's order. Bills were rendered to appellant when the

deliveries were made, and the bills were paid in the usual course of business. The prices varied, depending on the market. Appellee fixed the price when it printed a "particular lot" of forms. The forms would be invoiced "at the cost when they were printed." This had been done "over a course of years."

The principal question in the case is whether appellant ordered appellee to print the forms in question, which appellant has on hand, or whether appellee printed them on its own motion and at its own risk. Appellant contends that it did not contract for the printed forms and is not under any legal obligation to pay for them. Appellee's contention is that there is a valid, enforceable contract consisting of a present sale for future delivery; and that the contract implied that appellant would accept delivery of the forms in question within a reasonable time.

From the evidence it appears that the negotiations for the forms in question began with a letter of March 11, 1920, from a representative of appellee named Gless to a representative of appellant named Church. The letter in substance is as follows: "There is enroute 102 reams and 350 sheets of 39½ x 54½ - 65# Jute Manila which was ordered for your expense bills, Form 5, and which will make 616,200 of the above blanks. We have figured out how many have been used of each form by the different stations and have come to the conclusion that they should be run in quantities as mentioned below: (Then follows the estimated amounts.) We have on hand from the previous runs 127,000 Form 5 Milwaukee to Chicago and 15,000 Form 5 Racine to Milwaukee. The last two items have been taken into account in dividing the present run which we think will come out as evenly as can possibly be estimated. If this meets with your approval, you will kindly acknowledge receipt of this letter, giving us authority to proceed with the above."

About the time this letter was written there was a

deliveries were made, and the bills were paid in the usual manner at business. The points varied, depending on the market. Appellee claimed the price when it printed a "particular lot" of items. The items would be invoiced "at the date when they were printed," that was usually "over a period of years."

The principal question in the case is whether appellant offered sufficient evidence to prove that there is no liability, which appellant has on hand, or whether appellee proved that at the due notice and of the two sides. Appellant contends that it did not contract for the printed forms and is not under the legal obligation to pay for them. Appellee's contention is that there is a valid, enforceable contract notwithstanding a statement made for future delivery; and that the business dealing that transpired amounts to a delivery of the forms on receipt within a reasonable time.

From an examination of evidence that has accompanied the forms to Jonesboro began with a letter of March 11, 1938, from a representative of appellee asking about what is a reasonable price of envelopes manufactured. The letter in pertinent is as follows:

"Please let advise the price of 500 envelopes 3 3/8 - 3/4 inch flap, white, with the enclosed for your minutes bills, Nos. 1, and which will make 514,000 of the above forms. In this letter there was also some form used of such form in the difference envelopes and here was in the business that they contemplated to commence on mentioned dates: (Then follows the mentioned dates.) In June we need from the previous year 417,000 Nos 9 envelopes in January and 14,000 Nos 9 Backs in February. The last two items are both light into account in stating the present, was which we think will come out as steady or can easily be estimated. If this meets with your approval, we will start manufacture receipt of this letter, giving us authority to proceed with the above."

About ten days later the letter was written stating that a

telephone conversation between Gless and Church in regard to the matter. Gless testified that he told Church that the "paper was coming in;" that Church told him "to go to work to figure out what quantities they were supposed to run in;" and that he, Gless, did so and notified Church. According to Church, Gless informed him in the telephone conversation that "there would have to be a change in the paper;" that he "could not get the paper they had been using." Church also testified that Gless "submitted some samples to try out." March 17, 1920, Church wrote to Gless as follows: "Confirming my telephone communication this date, relative to expense bill paper you have on hand, would say you are now at liberty to proceed with the printing of expense bills on plans outlined in your communication of the 11th inst."

March 23, 1920, Gless wrote to Church the following letter: "We are entirely out of Forms 12 Waybills, 14 Station Record and 17 Warehouse Record. We are proceeding with printing 20,000 of each of the three forms and will carry them in stock for you as we have done in the past. If this is not satisfactory kindly let us hear from you by return mail."

To the above letter Church replied March 24, 1920, as follows: "In reply to your favor of the 23rd inst. would say, it will be satisfactory to us to keep on hand the stock of Way Bills, stationery records, and Warehouse Records which you refer to."

Appellant's auditor, named Ott, testified that in the fall of 1921 Gless called him on the telephone and wanted to know why they didn't order more expense bills, and that he, Ott, told him that the business had fallen off and the expense bills were not required.

telephone conversation between Clark and Gleason in regard to the matter. Clark replied that he told Gleason that the "proper one should try" that Gleason said that "it is up to us to find in figure out what qualities that were mentioned in our ad." and that he, Clark, did so and qualified Gleason. Accordingly to Gleason, Clark informed him in the telephone conversation that "Young should have on the a chance in the contest" that is "Judge and the owner they had been using." Clark then indicated that "subjective were employed in the ad." (Page 17, 1-3). Gleason wrote to Clark as follows: "Qualifications of individuals mentioned this date, relative to another file which you have on hand, would you be so kind as to inform us which of the qualifications employed in your consideration of the file were used."

Page 18, line, Clark wrote to Gleason as follows: "We are actually not at liberty to divulge Bauer and Y Gleason matter. We are approaching with original 10,000 or more of the same type and will very soon be ready for you to work them in for you. If this is not satisfactory right? Let us know from you by return mail."

In the above letter Clark replied Gleason on, 1967, as follows: "In reply to your letter of the first inst. would say, it will be satisfactory to us to keep on hand the name of the Ability, evaluation reports, and Performance reports with you. Yours ie."

Gleason's letter, dated 1967, that has the qualifications of Bauer, Young and Gleason in the qualifications and results in more any that Clark's letter make reference still, and that the, the, this the most are Bauer and Young all and the Gleason files were not reviewed.

Gless testified that in February or March, 1922, he asked Church why he did not take some of the forms and that Church said he "would look into it." February 3, 1922, Gless wrote the following letter to Church: "As per our conversation over the 'phone some days ago, you requested me to give you a list of the forms which we have on hand for your line, which we are pleased to give you as follows: (The list follows.) Most of these forms we have had on hand for more than two years and trust that your business will pick up so that we may be able to move them faster."

Gless testified that in March, 1922, he asked Church "to remove some of the stuff," and that Church said he "would look into it."

March 30, 1922, Gless wrote the following letter to Church: "Please refer to our letter of February 3rd in regard to forms which we have on hand. We are giving you a revised list below as follows: (The list follows.) The total amount of the above list amounts to $1,187.50 and we have charged against you on our books amounting to $545. We must know at once what you intend to do on the above matter or take other means to collect this account. Kindly let us hear from you in regard to the above and oblige."

We are of the opinion that the evidence establishes a valid, enforceable contract between the partiss.

The theory that appellee printed the forms in question on its own "initiative" and "at its own risk" is inconsistent with the evidence. From the evidence it clearly appears that appellee asked for and received authority to print the forms.

Counsel for appellants contend that the verdict is contrary to an instruction given by the court which, in defining what was necessary to constitute a contract in the case, told the jury, among other things, that they must believe from the evidence

Clara invited Joel to Fairway on June, 1970, to meet Church. Joel to let not know more of the farm and that Church said he "would look into it." Thereby ", 1970, Clara wrote the following letter to Church: "As our conversation when you visited here a few days, you requested me to give you a list of the farms which we have on hand for sale, which we are pleased to give you as follows: (The list follows.) Most of these farms we have had on hand for more than two years and since this your business will run on so such is not to be sold some time further."

Clara explained that in June, 1970, Mr. Joel Church "Mr. Pressey was at the staff," and that Pressey will in "would take care it."

Here is, 1972, Clara wrote the following letter to Church: "Please refer to our letter of December 7th in regard to farms for sale which we have on hand. We are giving you a revised list below as follows: (The list follows.) The total amount of the above list amounts to $1,[illegible], and we have several members who are your best customers in Ariz. We must have a very short time in which to go on the above matter or they might move to another area. Kindly let us know how you is equal to the "deep and ability."

It is of the opinion that the [illegible] relationship with, otherwise existed between the parties.

The answer that appears primary the farms to [illegible] also on its own "initiative" and "in its own right" is inconsistent with the evidence. From the evidence it appears Church took approximately about the [illegible] activity to assist the firm.

Counsel for appellants argued that the result is contrary to an instruction given to the jury which stated, in defining what was necessary to constitute a contract in the case, into the jury, among other things, that they must believe from the evidence

that appellant agreed to pay for the forms in question "at a stipulated amount or price;" and counsel assert that there "is not a syllable of testimony in regard to what the price was to be, or that the defendant agreed to pay the price." We do not think that the contention of counsel is correct. The evidence shows that it was the custom during the number of years that appellant and appellee dealt together, to fix the price for the forms at the time they were printed and to invoice them at that price; and that the price varied depending upon the market. The evidence also shows the price for the forms in question, computed in accordance with the market price at the time the forms were printed. In our opinion there is sufficient evidence for the jury to have found in accordance with the instruction that appellant "agreed to pay a stipulated amount or price" for the forms in question.

Counsel for appellants contend that appellee has not proved its case by a preponderance of the evidence. In the case at bar we do not think that the verdict of the jury is manifestly against the weight of the evidence.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

that appellant agreed to pay for the lease in question "at a calculated amount or price;" and secondly asserts that there "is not a minimum of evidence in support to show the price was to be, or that the defendant agreed to pay the price." We do not think that the contention of counsel is correct. The witness admit that it was the usual custom during the months of April and September each together, at the price for the farms at the time they were planted and to receive them on that price; and that one gives valid knowledge such the market. The evidence also shows the price for the farms in question, according to accounts, the 12th which price paid at the time the leases were entered. In our opinion there is sufficient evidence to [illegible] to have found in accordance with the instruction that appellant "agreed to pay a calculated amount or price" for the farms in question.

Counsel for appellant insists that [illegible] placed its case by a preponderance of the evidence. In the end we fear we do not think that the results of the jury in resolving the weight of the evidence.

For the reasons stated the judgment is affirmed.

Judgment affirmed.

Watchorn, P. J., and Petrullo, J., concur.

(3482)

175 - 28451

EMMA CARUS.
Appellant.

vs.

CITY OF CHICAGO.
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

232 I.A. 615

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Emma Carus, who was found guilty by the Municipal Court of the City of Chicago of disorderly conduct under an ordinance of the City of Chicago, and was fined $100. The appeal is one of two appeals, which were prosecuted separately by Emma Carus and J. Walter Leopold, both of whom were found guilty by the Municipal Court of disorderly conduct. The separate appeals were consolidated for hearing in this court.

The complaint charges appellant and J. Walter Leopold with assaulting Harry L. Newman and Teresa Newman.

The principal ground upon which it is sought to reverse the judgment of the Municipal Court is that appellant and Leopold were not the aggressors. The altercation began in the room of the hotel occupied by Newman and his wife and ended in the hall leading to the room. The testimony as to who were the aggressors is conflicting, but we are of the opinion that on a fair construction of all of the evidence appellant and Leopold were clearly the aggressors. The substance of the testimony of Newman ad his wife is that appellant called up Newman in his room by telephone about 12:30 at night and asked him if she could come up and "have a little chat" for a few moments; that nothing was said about Leopold accompanying her; that when appellant arrived at Newman's door Leopold was with her; that Leopold said to Newman, "Now I have got you where I want you," and without any provocation Leopold and

BOARD CLERK.

Appellant.

vs.

APPEAL FROM

CITY OF BOULDER.

Municipal Court

Appellee.

of Boulder.

MR. JUSTICE TOMPKINS DELIVERED THE OPINION OF THE COURT.

This is an appeal by some lawyers, who we found guilty by the municipal court of the city of Boulder of disorderly conduct under an ordinance of the city of Boulder, and we fined $100. The appeal is one of law on error, which was prosecuted separately by each court and C. Walter Lamphil, with of whom were found guilty by the municipal court of disorderly conduct. The separate appeals were consolidated for hearing in this court.

The complaint charges appellant and C. Walter Lamphil with assaulting Harry L. Hanson and Thomas Hanson.

The national issue upon which it is sought to reverse the judgment of the municipal court is that evidence was admitted that was not the whole evidence. The altercation began in the room of the hotel occupied by Hanson and his wife and ended in the hall leading to the room. The testimony as to who were the aggressors is conflicting, but in view of the opinion that we have concerning the of all of the evidence upon which the judgment was rendered the errors. The substance of the testimony of Hanson of his wife is that appellant called to Hanson in his room by telephone about 12:30 at night and asked him if the girl would come up and "have a little chat" for a few moments; that Hanson was said about twenty seconds putting her; then each appellant entered the Hanson's door leading into with her; that Lamphil said to Hanson, "Now I have got you where I want you," and without any provocation Lamphil and

appellant assaulted Newman and his wife.

Briefly stated, the testimony of appellant is that she and Leopold were dining with some friends on the night of the altercation, and one of the friends told appellant and Leopold that Newman had called Leopold a pimp; that Leopold "got very much infuriated;" that appellant telephoned Newman, went to his room and asked him if he had made the remark; that Newman "put up his hands" and he and Leopold began to fight; that the only part that appellant took in the affair was to try to prevent Newman's wife from getting his gun which he had asked her to get. Leopold testified that his and appellant's "purpose in going up to" Newman's "room was to ascertain whether he said a certain thing which I was informed he said." The testimony of Leopold on direct examination as to what happened when he went to Newman's room is as follows: "When I knocked at the door Newman opened it. I entered the room and asked him what he meant by calling me such a name. When I first entered the room I said, 'Hello, Harry,' and shook hands with him. I then asked him what he meant by calling me a pimp and he says, 'Why, what does this mean,' and in saying that he put up his hands, and we had it out. I believe he struck me first and then I struck him." On cross-examination Leopold testified that he did not "know if he struck me or not, everything went so quickly."

From the testimony on behalf of appellant there is only one reasonable conclusion to be drawn, and that is that appellant and Leopold were the aggressors. In our opinion the judgment of the trial court was correct, and is therefore affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

appalling scandals known and all safe.

Briefly stated, the testimony of apollinaris is that she and Leopold were dining at the home friends on the night of the abduction, and one of the friends told apollinaris and Leopold that Herman had called Leopold a pimp; that Leopold "got very warm indeed;" that apollinaris telephoned Herman, went to his room and "had him if he had made the remark; that Herman "put up his hands" and he and Leopold began to fight; that the only part that apollinaris took in the affair was to try to prevent Herman's wife from getting his gun which he had taken her to get. Leopold testified that his and apollinaris' "purpose in going up to" Herman's "room was to identify ourselves to him and a certain thing which I had learned in jail." The testimony of Leopold in direct examination as to what happened when he went to Herman's room is as follows: "When I knocked at the door Herman opened it. I recognized the man who had been with me before by calling me a name. Then I first entered the room I said, 'Hello, Herry,' and shook hands with him. I then asked him if he minded my calling me a pimp and he says, 'Why, what does this mean,' and in conversation that I had to put to his hands, and he did it too. I looked to assure me first, and then I asked him, 'Do you remember telling Mrs. Leopold that he did not know if he should or if not, something about not to pimp.'"

From the testimony of Leopold of conditions known to only one reasonable conclusion to be true, and that is that apollinaris and Leopold were the aggressors. In our opinion the judgment of the trial court was reversed, and is therefore affirmed.

DOCKETT, J.

Pelcher, C. J., and Hughes, J., concur.

(34830)

176 - 28452

J. WALTER LEOPOLD, Appellant,	APPEAL FROM
vs.	MUNICIPAL COURT
CITY OF CHICAGO, Appellee.	OF CHICAGO.

232 I.A. 615

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by J. Walter Leopold, who was found guilty by the Municipal Court of the City of Chicago of disorderly conduct under an ordinance of the City of Chicago, and was fined $100. The appeal is one of two appeals, which were prosecuted separately by J. Walter Leopold and Emma Carus, both of whom were found guilty by the Municipal Court of disorderly conduct. The separate appeals were consolidated for hearing in this court.

The complaint charges appellant and Emma Carus with assaulting Harry L. Newman and Teresa Newman.

The principal ground upon which it is sought to reverse the judgment of the Municipal Court is that appellant and Emma Carus were not the aggressors. The altercation began in the room of the hotel occupied by Newman and his wife and ended in the hall leading to the room. The testimony as to who were the aggressors is conflicting, but we are of the opinion that on a fair construction of all the evidence appellant and Emma Carus were clearly the aggressors. The substance of the testimony of Newman and his wife is that Emma Carus called up Newman in his room by telephone about 12:30 at night and asked him if she could come up and "have a little chat" for a few moments; that nothing was said about appellant accompanying

2. Albert Lynch,
Appellant,

vs.

City of Oakland,
Respondent.

Appeal from
Superior Court
of Alameda.

Mr. Justice Lorigan delivered the opinion of the court.

This is an appeal by A. Albert Lynch, who was tried and convicted by the municipal court of the city of Oakland of the violation of the ordinance of the city of Oakland, and was fined $100. The appeal is one of two appeals, which were presented simultaneously by A. Albert Lynch and Jack Davis, both of whom were tried and convicted by the municipal court of the city of Oakland. The appellate proceedings were consolidated for hearing in this court.

The municipal ordinance involved was passed under the authority of Section 4, Charter and Statutes Amendment.

The principal errors upon which it is claimed by Davis the jurisdiction of the municipal court is that ordinance and that there were two the appellants. The information upon in the name of the Davis concerning by Davis and his wife and signed by the full jurisdiction by the court. The testimony in the case after the conference in conferences, and at the of the opinion that on a date concerning of the the ordinance appellant and Jack Davis were charged the appellants. The witnesses of the prosecution of between the the city is that Jack Davis called on Thomas to his place to [illegible] about [illegible] at night and asked him if he would come to and [illegible] a little chat for a few minutes; that witness was with about [illegible] conversation

her; that when Emma Carus arrived at Newman's door appellant was with her; that appellant said to Newman. "Now I have got you where I want you," and without any provocation appellant and Emma Carus assaulted Newman and his wife.

Briefly stated the testimony of appellant is that he and Emma Carus were dining with some friends on the night of the alteration, and one of the friends told appellant and Emma Carus that Newman had called appellant a pimp; that appellant "got very much infuriated;" that Emma Carus telephoned Newman; that Emma Carus and appellant went to Newman's room and asked him if he had made the remark; that Newman "put up his hands" and he and appellant began to fight; that the only part that Emma Carus took in the affair was to try to prevent Newman's wife from getting his gun which he had asked her to get. Appellant testified that his and Emma Carus' "purpose in going up to" Newman's "room was to ascertain whether he said a certain thing which I was informed he said." The testimony of appellant on direct examination as to what happened when he went to Newman's room is as follows: "When I knocked at the door Newman opened it. I entered the room and asked him what he meant by calling me such a name. When I first entered the room I said, 'Hello, Harry,' and shook hands with him. I then asked him what he meant by calling me a pimp and he said, 'Why, what does this mean,' and in saying that he put up his hands, and we had it out. I believe he struck me first and then I struck at him." On cross-examination appellant testified that he did not "know if he struck me or not, everything went so quickly."

From appellant's own testimony there is only one reasonable conclusion to be drawn, and that is that appellant and Emma Carus were the aggressors. In our opinion the judgment of the trial court was correct, and is therefore affirmed.

Matchett, P.J., and McCurely, J., concur. JUDGMENT AFFIRMED.

[illegible]; that when Dunne drove arrived at Brennan's door [illegible] was with her; that [illegible] left to Dunne. "Now I have not you where I want you," was without any preparation [illegible] and [illegible] between him and his wife.

Finally under the testimony of [illegible] in their [illegible] and Dunne turns were discussing with some friends in the light of the altercation, and one of the friends told [illegible] and Dunne that Brennan had called [illegible] a [illegible]; that [illegible] "got very mad [illegible]" then Dunne turns testimony [illegible]; that Dunne and [illegible] went to Brennan's room and asked him if he had made the remark; that Brennan "got up [illegible] and he and [illegible] began to fight; that the only part that Dunne took in the affair was to [illegible] Brennan's wife from getting his gun which he had taken out to [illegible].

[illegible] testified that his and Dunne turns' "[illegible] in going up to" Brennan's "room was to [illegible] whether he had a certain thing which I was informed he said." The testimony of [illegible] on direct examination as to what happened when he went to Brennan's room is as follows: "Then I knocked at the door Brennan opened it. I entered the room and asked him what he meant by calling me such a name. Then I first entered the room I said, 'Hello, Larry,' and shook hands with him. I then asked him what he meant by calling me a name and he said, 'Oh, that was this man,' and in saying that he pointed him [illegible], and he had it not. I believe he struck me first and then I struck at him." On cross-examination [illegible] testified that he did not "know if he struck me or not, everything went so rapidly."

From [illegible]'s own testimony there is only one reasonable conclusion to be drawn, and that is that [illegible] was Dunne were the aggressors. In our opinion the judgment of the trial court was correct, and is hereby affirmed.

Bartnett, C.J., and McCarty, J., concur. [illegible] dissent.

225 - 28501

(3484a)

EMMA KELWIN, Appellee, vs. F. W. HARSH, Jr., et al., Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal courtof Chicago on a verdict in favor of appellee in an action of forcible entry and detainer brought by appellee against appellant.

June 14, 1922, appellee purchased the premises in question, on which was situated an apartment building containing nine apartments. At the time of the purchase appellant was the lessee of the building under a written lease. The lease was duly assigned to appellee by the lessor. All of the apartments were occupied by tenants and the original action included the tenants as defendants; but on the trial of the case appellee dismissed the action as to the tenants. The lease of appellants contained the following provision:

Said lessor reserves the right to terminate this lease at any time during the term hereof, if said lessor shall sell said premises, upon giving to said lessee thirty days written notice thereof. Upon such termination, if the same shall take place within two (2) years from the date hereof, lessor agrees to pay to lessee a sum equal to 2½ per cent. upon the price for which said premises are sold."

Pursuant to this provision both the former lessor and the appellee served appellants with notices of the sale of the premises, and of an election to terminate the lease. Appellant refused to recognize the termination of the lease. The trial

(3447)

United States District Court
for Delaware.

Equal Rights,
Appellee,

vs.

W. H. Ewart, Jr., et al.,
Appellants.

Mr. Justice Douglas delivered the opinion of the court.

This is an appeal from a judgment of the Delaware Supreme Court which, on a writ of certiorari to an action of federal duty and delegate origin by qualified electors, petitioned.

June 14, 1957, appellee petitioned the prothonotary of Sussex County, in which was situated an unincorporated but fully incorporated town commonly. At the time it the voters municipal for the issuance of the building under a written issue. The issue was duly analyzed in compliance by the issuance. All of the signatures were counted by hand and by original notice directed the township as defendants; but on the trial of the case appellee dismissed the action as to the township. The issue of appellants contested the following principles:

"All legal voters shall have the right to participate this issue at any time during the bare period, if such issue shall not said problem, upon giving to such issue voters days written notice thereof. Upon such participation, if the same shall take place within two (2) years from the date hereof, legal notice to be issued a one equal to 50 per cent, upon the notice for voting said problem are said."

Pursuant to this provided vote the issue issue and the appellee served inhabitants with notices of the date of the problem, and of an election to participate in issue. Questions relevant to promulgation the termination of the issue. The trial

was had before a jury. The court directed a verdict for appellee. Several errors are relied on for reversal by appellant.

It is contended by counsel for appellant that the signature of appellant to the lease was not properly proved. Henry A. Berger, a witness for appellee, testified that he was acquainted with the signature of appellant from having seen it a number of times; and that in his opinion the signature was that of appellant. He also testified that he had never seen appellant write his name; and that he did not "know" whether appellant was the same person who wrote the name on the lease as who wrote the same name on certain checks which he, the witness, had seen. To render the witness competent to testify as to appellant's handwriting, it was not necessary for the witness to have seen appellant write; and it was not necessary for the witness to "know" that the signature was that of appellant. It was sufficient that the witness became acquainted with the handwriting in business transactions and that he was able to give an "opinion" as to the handwriting. Riggs v. Powell, 142 Ill., 453, 457; Board of Trustees v. Misenheimer, 78 Ill., 22, 23; Fash v. Blake, 38 Ill., 363, 368.

Counsel for appellants further contend that it was error to render judgment against appellant alone; that "several judgments" should have been "rendered for the various portions of the premises occupied by the several defendants." Section 18 of Chapter 37 relating to Forcible Entry and Detainer provides that "all or so many" of the occupants, as the "plaintiff may elect," may be joined as defendants in one suit.

It is next objected by counsel for appellants that there is no proof that appellant was in possession of any part of the premises. Proof of "physical possession" by appellant was not necessary. George J. Cooke Co. v. Fitzgerald, 131 Ill. App., 133, 136. In Peters v. Balke, 170 Ill., 304, the court said (pp. 313, 314): "It has always been held by this court that

was had before a jury. The court directed a verdict for appellee. Several errors are relied on for reversal by appellant.

It is contended by counsel for appellant that the signature of appellant to the lease was not genuine. Henry A. Dreyer, a witness for appellee, testified that he was acquainted with the signature of appellant from having seen it a number of times; and that in his opinion the signature was that of appellant. He also testified that he was never been acquainted with his handwriting, and that he did not "know" whether appellant was the same person who wrote the name on the lease or who wrote the same name on certain checks which he, the witness, had seen. To render the witness competent to testify as to appellant's handwriting, it was not necessary for the witness to have seen appellant write; and it was but necessary for the witness to "know" that the signature was that of appellant. If the witness had had the witness become acquainted with the handwriting in ordinary transactions and that he was able to give an 'opinion' as to the handwriting. Sikes v. Carroll, 14 Ill., 273; Union of Transport v. Wisenhunter, 78 Ill., 63; Ford v. Elder, 24 Ill., 247, 248.

Counsel for appellant further contend that it was error to render judgment against appellant alone; that "several judgments" should have been rendered for the various portions of the premises described in the several affidavits." Section 22 of Chapter 77 relating to Juvenile Court jurisdiction provides that "all or so much of the accompanying, as the 'violation' may clear," may be filed as references in one suit.

It is next objected by counsel for appellant that there is no proof that appellant was in possession of any part of the premises. Proof of "physical possession" by appellant was not necessary. Arcade 4-Cents Co. v. Kilgorski, 124 Ill. App., 124, 126. In Kaiser v. Dolan, 172 Ill., 256, the court said (pp. 263, 264): "It has always been held by this court that

possession through a tenant is actual possession by the landlord."

Counsel for appellants further contend that it was error for the court to allow the husband of appellee to testify in behalf of appellee. The action in the case at bar related to the separate property of appellee, and under section 5 of the Evidence Act it was competent for the husband to testify. It would be competent for him to testify even though the title of appellee should not be admitted. J. Obermann Brewing Company v. Caroline Ohlerking, 33 Ill. App., 356, 357; McNail v. Ziegler, 68 224, 225.

The next objection of counsel for appellants is that the court erred in not admitting a copy of a warranty deed offered by counsel for appellants. The copy was not certified by the recorder and was properly excluded. Judson v. Freutel, 266 Ill., 24, 30. It is asserted by counsel for appellants that a specific objection was necessary and that none was made. The case of Cantwell v. Stockman's Bank, 187 Ill., 275, 279, is cited in support of the contention. The record shows that when the copy of the deed was offered the court asked specifically whether it was "a certified copy."

The court did not err in directing a verdict in favor of appellee. The judgment of the court is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

possession thereof a lessee is actual possession by the landlord.

Demurrer for overliberal further consideration. It was error for the court to allow the husband or wife to be heard in behalf of appellee. The action of the court in the exercise of the separate property of appellee, and under section 2 of the Evidence Act it was competent for the husband to testify. It would be competent for the wife to testify even though she sues by her husband and be admitted. 4. Husband and wife. Separate property. Separate valuation. 31 Ill. App., 119, 121; Abbott v. Chapin, 63 Ill., 378.

The main objection of counsel for appellee is that the court erred in not admitting a copy of a notary seal affixed by counsel for appellant. The copy was not certified by the recorder nor was properly received. Fisher v. Prince, 161 Ill., 24, 30. It is asserted by counsel for appellee that a material objection was necessary and that none was made. The case of Dartell v. Hoffman Bank, 139 Ill., 290, 297, is cited in support of the proposition. The record shows that when the copy of the deed was offered the court asked respondent whether it was "a certified copy."

The court did not err in directing a verdict in favor of appellee. The judgment of the court is affirmed.

Judgment affirmed.

Mathews, C. J., and Vickers, J., concur.

234 - 28510

(34852)

F. S. KUNKEL,
Appellant,

vs.

C. PARELIUS,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

232 I.A. 515

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action on a promissory note for $1693.68 brought by appellant against appellee, the maker of the note. The defense of appellee was that the note was without consideration, and that it was executed under duress. The case was tried before a jury. The verdict was in favor of appellee. Judgment was entered upon the verdict, and appellant prosecuted this appeal from the judgment. Only two witnesses testified on the trial, appellant and appellee. Their testimony is directly conflicting. Appellee testified in substance that while he was employed by a Coal company as a salesman, appellant, who was engaged in the real estate business, asked him to enter appellant's employ; that he, appellee, told appellant that he had not had any experience in the real estate business; that appellant said that all he would have to do would be to make sales and that he, appellant, would close them; that he, appellee, told appellant that he would "have to have a salary" as he had five children to support; that appellant offered to give him a salary for a year of $40 a week; that after this conversation, about a week later, appellant urged appellee to come to work for him, offered appellee a salary of $50 a week and a commission on all sales over $50 a week; that he, appellee, started to work for appellant on May 10, 1920, and worked continuously until March 5, 1921; that during that time appellant paid him $50 a week. The facts relating to the signing of the note in the case at bar, as testified to by appellee, are as follows:

J. B. ADAMS,
Appellant,

vs.

G. TUCKER,
Respondent.

Appeal from Superior Court
of King County.

93213 - 1.1.3

JS. Tucker leasing building for saloon on his own.

This is an appeal at a preliminary hearing for damages, brought by appellant against respondent, the owner of the premises. The defense of appellant was that the lease was without consideration, and that it was obtained under duress. The case was tried before a jury. The verdict was in favor of respondent. Judgment was entered upon the verdict, and appellant accordingly this second time the judgment. Only two witnesses testified at the trial, appellant and respondent. Their testimony is directly conflicting. Appellant testified to substantially the following: That respondent had occupied a building, consisting, the two together in the first story of a building, upstairs, the two together in the first story of a building, upstairs, which he was occupying as a saloon; that respondent had asked him if he would be willing to move out and let him, respondent, occupy those rooms; that he, appellant, told respondent that he would "have to have a notary" to be that the building is insured; that respondent offered to give him a notary for a term of five a week; that after some conversation, about a week later, respondent came again to come to work for him, offered something a salary of $20 a week and a percentage of all sales over $40 a week; that he, respondent, wanted to work for appellant in his saloon, and opened towards April 5, 1920; that during that time respondent paid him $20 a week. The facts relating to the signing of the note in the sum of $40, as testified to by appellant, are as follows:

"March 5, 1921, was on a Saturday, and I worked that day. I saw Mr. Kunkel all day. Then about nine o'clock in the evening he called me into the private office and gave me a check which I was to have had the week prior to that, the week following the 26th, and the check had not been endorsed or signed by him; and I take the check prior to that and goes out and cashes it, and the fellow says, 'It is not signed.' So I had to take the check back and have it signed by Mr. Kunkel, and he didn't sign it until Saturday. Saturday night he called me in the office and said, 'Chris, come in and get your check,' calling me into the private office. That was on March 5, 1921, nine o'clock in the evening. 'Here is your check,' he said, and with that he turns around in his revolving chair and faced north by a little table that was there, and says, 'Here is a note I want you to sign. Here' he said, 'is a note I want you to sign.' I told him I would not sign it; that I had no agreement with him regarding any note; and he said, 'Well,you sign it. Will you sign it?' I said I would not. I said, 'I can't do it,' and he said, 'You will do it.' I said, 'I can't do it, I don't owe it.' And Mr. Kunkel had a gun, and he says, 'If you don't sign that note I will take your life,' and I says, 'I can't do it.' And then he gets up and takes a shot at me, and missed me. And that is how I happened to sign. And he had his son there, George, and both of them made me sign a note. He told George to turn out the lights from their private office so we would be back in the dark, and both there fought with me until I just had to do it, and they kept me there three hours, till after twelve o'clock that night; and then he said, 'Here, you son-of-a-bitch, sign it over.' That was on another, a second note; he dated the first one better - and I picked up one, and that is how I happened to have a copy. At that time I signed two notes. He said the signature was not

'March 8, 1941, was an a Saturday, and I recall that day. I was six years old. That morn where then a'lying in the evening he called me into the dining office and gave me a dime and said I was to buy, but the that said I. Then, the week following the death, and the check had not been endorsed or signed by him; and I was the same order to then was just my and answer by, and the fellow says, 'It is not enough.' So I had to take the check and have it signed by Mr. Tarrant, and he didn't sign it until Saturday. Somebody might be waiting in the office and said, 'Check, come in and get your order ready,' waiting on late for private office. Still was in Part 1, 1941, when a'about in the evening. 'Then is your check,' he said, and said that he turns around to the receiving room and then hands by a little table that was there, and says, 'Here is a dime I want you to sign. Don't be mad, I'm a-sick I want you to sign.' I said that I would not sign it; that I had to be interested with the thingding any right; but he said, 'Well,you sign it. Will you sign it?' I said I would not. I said, 'I don't do it,' and he said, 'You sit to it.' I said, 'I don't to it, I don't see it.' And to, handed me a pen, and he says, 'If you don't sign that note I will take your life,' and I said, 'I don't do it.' And then he gets up and turns a chair on me, and advance on. And that is how I happened to sign. And he had his two sons, Jerome, and both of them went on also a knife. He also threatened to turn me the signing from their property office to be really be over in the back, and both were tough with and I just had to do it, and they kept on those three years, till after Lucky closed the night; and then he said, 'Now, you go-and-sign. Sign it now.' That was on another, a second note; he asked the first one better - and I pitied on me, and that is how I happened to have a copy. At that time I signed the paper. He will the signature was not

good enough, that I could write better than that if I wanted to."

Appellant testified that appellee solicited him for employment; that appellant told appellee that his men were employed on a commission basis; that sometimes he, appellant, advanced them money; that appellee asked appellant if he could do that for him; that he, appellant, agreed to advance appellee $50 a week; that he, appellant, never told appellee that he would pay appellee a salary.

Appellant testified further that the note in question was not signed and delivered to him on March 5, 1921; that the note was delivered to him on January 2, 1921, and that at that time he had advanced appellee weekly payments by checks amounting to $1693.68 (the amount of the note in question). The weekly checks paid to appellee were introduced in evidence. On the checks there is the notation "adv. acc." Appellee testified that the notation meant "it was to be charged account of services rendered."

Appellant testified that on March 5, 1921, he asked appellee to sign a note for about $400 for checks that had been advanced by appellant, and that appellee refused to sign the note. On the question of duress appellant testified that he did not shoot at appellee or fire a shot in his presence; that no blows were struck - "absolutely no;" that he, appellant, was "perfectly friendly, absolutely." Appellant testified that the rear door of his office was near the exits of an adjacent theatre. Appellee testified that there were no exits near appellant's private office; that there was a "walk along there," but that "nobody comes in or goes out there."

Counsel for appellant contend that there is "no preponderance of evidence in favor" of appellee "upon the plea of duress" and that "the verdict is against the evidence." In the case at bar the evidence is directly conflicting on the question of duress, and the rule is well settled that where there is a con-

good enough, that I could voice serious doubts that if I tested it,"

Questioned tentative that questions relating are the employers; that questions only suggests that its case more suspicious on a considering basis; that questions by, questions", are revealed that doubts; that questions could if be equal do that for its; that by, questions, appeal is without questions for a case; that to, questions, were talk questions lead to round any questions a values.

Questions testified Jackson that the work to questions was not signed the testimony in the on April 2, 1970; that she note was interrupted to the on January 2, 1970, and that at that time he had advanced questions evasively responding in phrases questions to Jackson.02 life amount of the note in questions. The sworn phrase paid to questions note interrupted to evasively. On the phrase there is the question "Why, sir." questions testifies that the questions sworn "It was to be charged account of witness testimony."

Questions testified that on March 2, 1970, he signed appeared to sign a note for about $400 for Jackson that had been endorsed to questions, and that questions returned to sign the note. On the questions of Jackson questions testified that he did not about as questions or file a document in his possession; that no claims were pursue - "Questions-no;" said he, questions, was "relatively friendly, sir-friendly." Questions testified that the two-door of his office was near the waste of a neighbor Jackson. Questions testified that there was no notice were on notice questions's witness affirmed; that there was a "walk about there," but less "nearer where is or could not there."

Counsel for questions emphasized that there is the questions-testimony of witness in "order" of questions "upon the plea of Jackson" and that "the question is against the witness." In the case at bar the witness is directly testifying on the questions of Jackson, and the note is not material that there were in a con-

flict in the evidence the verdict will not be set aside if the the facts and circumstances, by fair and reasonable intendment, will authorize the verdict, notwithstanding the verdict may appear to be against the strength and weight of the evidence. The Illinois Central Ry. Co. v. Gillis, 68 Ill. 317, 319; Bradley v. Palmer, 193 Ill. 15, 89; Carney v. Sheedy, 295 Ill. 78, 83. The mere fact that there were only two witnesses in the case at bar, appellant and appellee, and that their testimony is in direct conflict does not of itself justify the contention that the evidence is evenly balanced. The jury may not have considered the testimony of the witnesses of equal credibility. The inherent improbability of a witness' testimony and his manner and demeanor while testifying are some of the matters which may be considered in determining the credibility of a witness. Podolski v. Stone, 186 Ill. 540, 548, 549. "No bill of exceptions or certificate of evidence attempts to or can reproduce fully and accurately the countenance, tone of voice and manner of the witness while testifying." Ayres v. Ayres, 142 Ill. 374, 375. It has been expressly held even in a criminal case that "the fact that there was only one witness testifying to the commission of the crime, and that he was contradicted by the defendant, is not, alone, sufficient to justify a reversal." The People v. Zurek, 277 Ill. 621, 625.

Counsel for appellant contend that appellee's testimony in regard to duress is uncorroborated and is "insufficient to meet the rule that he has the burden of proving such a defense to the note." It is not necessary as a matter of law that appellee should be corroborated, but there is a circumstance which strongly tends to corroborate his testimony as to duress, and that is that his signature to the note in question is almost illegible, whereas his signature on the checks from appellant which were endorsed by him in the ordinary course of business, is distinct and unusually well written. It is plainly evident that the signature to the note

Plier in the evidence the verdict will not be set aside if the facts and circumstances, by their sole reasonable tendency, will warrant the verdict, notwithstanding the verdict may appear to be against the strength and weight of the evidence. The Florida Factory Co. v. Pelham, 41 Fla. 477, 26; Bradley v. Adams, 124 Ill. 16, 26; Conrad v. Brown, 97 Ill. 23, 26. The mere fact that there was not the strength in the law or fact, the pleader has mentioned, and that trial tribunal is in error, the verdict does not at first (with the exception of the presumed is exact) however. The fact may not have convinced the minds of the minimum of equal capability. The inherent im probability of a defendant's testimony of his mental and physical inability are such as to bar evidence which may be admitted in determining the credibility of a witness. Lindsay v. Brown 128 Ill. 340, 344, 346. The ill or convenient to convince of evidence attempts by an case presented fully and particularly the proceedings, time of trial and manner in the witness will's testi- tyles.' Aetna v. Brown, 124 Ill. 371, 376. If the case cannot said even in a situated case that "the fact that there was only one witness testifying to the execution of the notes, and that he was contradicted by the defendant, is not, alone, sufficient to justify a verdict." Des Plaines v. Lewis, 97 Ill. 176, 180.

Counsel for appellee claimed that appellee's testi- mony in regard to Alvaro is uncorroborated and is "improbable on most the only that in the sum of the notes of appellee and a witness to the note." It is not necessary to a notice of law that indicted should be corroborated, but where is a circumstance which strongly tends to corroborate his testimony in a manner, and that it that all signature in the note in question is almost literally, whereas all signature on the change from questions which were answered by him in the ordinary course of business, is distinct and unmistakably well written. It is strongly evident that the signature on the note

was written in unusual circumstances. The signature to the second note, which appellee testified appellant compelled him to write because the first one was "not good enough," is also almost illegible.

In our opinion there is sufficient evidence to sustain a verdict finding appellant guilty of duress.

It is further contended by counsel for appellant that the court erred in allowing counsel for appellee to introduce in evidence, for the purpose of comparison, a signature which appellee wrote while he was on the stand as a witness. If it be granted that the ruling of the court was erroneous, it was not prejudicial to appellant, as there are signatures of appellee in evidence, introduced by appellant and admitted to be genuine, from which a comparison may be made. These signatures are similar to the one complained of. The admission of incompetent evidence is not prejudicial where the fact is proved by competent evidence. Winn v. C. C. C. & St. L. Ry. Co., 239 Ill. 132, 142; Policemen's Benevolent Ass'n v. Ryce, 213 Ill. 9, 22; Oldershaw v. Knowles, 101 Ill., 117, 120, 121.

Counsel for appellant contend that the court erred in giving instructions 5 and 6 on pages 20 and 21 respectively of the abstract. Although counsel do not expressly say so, we presume that the objection to the instructions is based on their inconsistency. In pointing out the instructions counsel refer to "instruction 6" as being on page 21 of the abstract, and states that it was given for appellant. The abstract shows that the instruction was given for appellee. The only difference, however, that this makes is that the particular inconsistency complained of by counsel occurs in connection with two of appellee's instructions, not in connection with an instruction of appellant and an instruction of appellee as would appear from the brief of counsel. There is also an inconsistency between appellant's instructions 1 and 2 as compared with ap-

pellee's instructions 5, 6, and 8; and the two latter instructions of appellee are also inconsistent with appellee's instruction 5. As all of the inconsistencies arise from a misconception of the rule of law governing duress, they may be considered together. Instruction 5 given on behalf of appellee told the jury, in substance, that if they believed that appellee signed the note "solely" on account of duress, they must find for appellee. Instruction 6, also given on behalf of appellee, instructed the jury, in substance, that if they believed that appellee signed the note under duress, "then the burden of proof" is on appellant "to establish a legal consideration for said note before he is entitled to a verdict." Instruction 8, given for appellee, is, in the part that is pertinent to this discussion, substantially the same as instruction 6. In instruction 1, given for appellant, the jury were told that the questions to be determined were whether the note sued on was given "without consideration and whether the same was given under duress;" that appellee had the "burden of proving these two defenses and unless he" proved "the same by a preponderance of all of the evidence in the case," appellant was "entitled to recover." Instruction 2, given for appellant, was substantially the same as instruction 1 for appellant. It told the jury that the burden was on appellee to establish "each of the pleas," and that if he failed in this the verdict should be for appellant. In instruction 5, given for appellee, duress is treated as a complete defense; in instructions 6 and 8, given for appellee, it is treated as only imposing the burden on appellant of proving a valuable consideration; and in instructions 1 and 2, given for appellant, both duress and want of consideration are required to be proved by appellee before he can recover. The rule is well established that the effect of an act done or contract entered into by reason of duress is to render such act or contract void. Bane et al. v. Detrick, 52 Ill. 21, 27; Schommer v. Farwell et al., 56 Ill., 542, 545; Oberstreet

v. Dunlap, 56 Ill. App. 486, 492; Green v. Moss, 65 Ill. App. 594, 596; Bradley v. Irish, 42 Ill. App. 35, 38; Mayer v. Oldham, 32 Ill. App. 233, 236; Shenk v. Phelps, 5 Ill. App. 612, 618, 619.

In the case of Rossiter v. Loeber, 18 Mont. 379, the court expressly held that it was error to instruct the jury that both duress and want of consideration had to be proved before a recovery could be had. The court said (p. 384): "it was error in the district court to instruct that it was incumbent upon the defendant to establish his defense of duress and compulsion and want of consideration by a preponderance of the evidence, and, if he failed to do so, plaintiff should recover. He was not bound to prove both such defenses; either if established would defeat a recovery by plaintiff."

It follows, as a necessary consequence from the authorities above cited, that duress is a complete defense. It was error, therefore, for the court to instruct the jury that the effect of duress was to impose the burden on appellant of proving a valuable consideration; and it was also error to instruct the jury that appellee had to prove both defenses, namely, that the note was executed under duress and also that it was without a valuable consideration, before he could recover. The correct instruction was instruction 5 given for appellee, which told the jury that if they believed that the note was executed under duress, then they must find for appellee.

The error committed by the courtin giving the inconsistent instructions, however, was not a prejudicial error against appellant, and this is true irrespective of the question which instructions the jury may have followed. If the jury followed the instruction given for appellee, in which duress was treated as a complete defense, they merely followed the correct rule of law.

If, on the other hand, they followed the instructions in which duress was not treated as a complete defense, they followed erroneous instructions which were favorable to appellant and harmful to appellee. In other words, the giving of the erroneous instructions resulted in an advantage to appellant to which he was not lawfully entitled, and in a disadvantage to appellee, to which he should not have been lawfully subjected. Appellant cannot complain of erroneous instructions given for appellee which were not prejudicial to appellant but were favorable to him. Calumet, etc. Dock Co. v. Morawetz, 195 Ill. 398, 406, 407; Race et al. v. Oldridge, 90 Ill. 250, 255. Nor will a reversal be granted because of inconsistent instructions where it is clear that the jury were not misled to the prejudice of appellant. Henry v. Stewart, 185 Ill. 448, 453; Roagland v. Great Western Tel. Co., 30 Ill. App. 304, 306; Sells v. The Sandwich Mfg. Co., 21 Ill. App., 56, 57. And a party has no right to complain of error in an instruction when a similar error appears in instructions given at his own request. C. & A. R. R. Co. v. Harrington, 192 Ill. 9, 25; Spring Valley Coal Co. v. Robizas, 207 Ill. 226, 229, 230; Chicago City Railway Co. v. Pural, 224 Ill. 324, 329; I. C. R. R. Co. v. Beebe, 174 Ill. 13, 27.

In Calumet etc. Dock Co. v. Morawetz, supra, it was held that where the court gave instructions on damages more favorable to a party than he was entitled to, the party could not complain of certain instructions in the case on damages given for his adversary.

In Henry v. Stewart, supra, the court said (p. 453): "The court gave two instructions at the instance of the defendant which were very favorable to such defendant, and which counsel says cannot be harmonized with the one above quoted, given for the plaintiff. The defendant could not object to those given at his instance, and if he is not able to harmonize them with the correct instruction given for the plaintiff it is not ground for reversal."

In Springfield Valley Coal Co. v. Robizas, supra, in

holding that an instruction was erroneous the court said (p. 229): "While that is true, the record shows that both parties tried the case upon the same theory."

Counsel for appellant further contend that the court erred in giving instruction 7 in behalf of appellee on the ground that the instruction "was in conflict with all of the evidence in the case." The instruction, in substance, told the jury that if they believed that appellee was employed on a commission basis, appellant would be entitled to recover only the difference between the advances made by appellant and the commissions earned by appellee. Counsel for appellant contend that as appellee admitted that he made no sales he evidently received no commissions, and therefore the instruction should not have been given. The question of the commissions was only a minor and incidental matter. The principal question in the case was that of duress. In our opinion, even if there was no evidence that appellee made any sales, the instruction was harmless. Errors in instructions which do not relate to the only controverted question in the case are not grounds for reversal. Gottmanshausen v. Wolfing, 127 Ill. App. 485, 488.

Instruction 8, given for appellee, is objected to by counsel for appellant on the ground that the verdict is in conflict with the instruction; that the instruction required appellant to prove a valuable consideration and that appellant made the proof. Counsel assert that the instruction "fairly stated the law in the case." We have previously referred to the instruction, and held that it did not correctly state the law; that it gave appellant an advantage to which he was not entitled. The instruction does not treat the defense of duress as a complete defense, but tells the jury that if they believe the note was signed under duress that then appellant must prove there was a valuable consideration. If there was duress appellant was not entitled to recover even though he proved that there was a valuable consideration.

holding that an interpretation can determine the state only (p. 349): "While that is true, the states does not even exclude what the same upon the same (ibid.)."

Given the logical theorem quoted, but the point arrived in giving prescription 7 is indeed of relevance on the issues that the interpretation "can be identified with or in relation to the case." The instructions, in reference, with the fact that if they believe that operation was employed on a computing basis, equivalent would be sufficient to provide only the alternate interpretation the wholesale code of work/fact and the interpretation should be ex-pulsion. Consider the hypothetical equivalent that an operation defined that he made no sense be relatively irrelevant or consequential, and therefore the instructions should not have been given. The question of the consistency was only a minor and tangential matter. The principal question in the case was that of intent. In our opinion, even if there was an attempt that possibly could not work, the instructions was helpful. Always in instructions which is all ex-lage is the only controversial question: 1. Did such or not crimes the accused. Frisendorfer v. Tarlton, 177 Ill. App. 607, 608.

Instruction 6, given for appellee, is erroneous in by commanded for eligibility on the ground that the trouble is to conflict with the instructions that the instructions required should consist to prove a valuable consideration and that equivalent such for equal. Counsel argued that the instruction "clearly stated the law in the case." We have previously referred to the instructions, and feel that it did not correctly state the law; that is quite equivalent to advantage to which he was not entitled. The instruction also not tender the defense of burden as a reasonable defense, but with the jury that if they believe the note was signed under circumstances that such would not have been the a valuable consideration. If there was duress appellee was not entitled to recover from appellee proved that there was a valuable consideration.

On the question of consideration, however, we are of the opinion that a finding that there was not a valuable consideration would not be manifestly against the weight of the evidence. We are also of the opinion that there is sufficient evidence to sustain both defenses of appellee, namely, duress and want of consideration.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

In the question of centralization, however, on the of the opinion that a Tribune that covers the day a reasonable centralization would not be sufficiently against the wishes of the majority. We are also of the opinion that there is sufficient evidence to establish very decisive of institution, control, duties and rules of centralization.

For the reasons stated the judgment is affirmed.

Separate opinion.

Bradwell, J. T., and Sullivan, J., concur.

240 - 28516

(3486a)

HATTIE BOUCEK,
Appellee,

vs.

FRANK BOUCEK,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit court of Cook County committing appellant, Frank Boucek, to jail for failure to pay appellee, Hattie Boucek, his wife, money alleged to be due her under a decree for separate maintenance granted to the wife. On appeal to this court by appellant the decree for separate maintenance was reversed on the ground that the decree contained no finding that appellee was living separate and apart from appellant without her fault. (Case No. 27396. Opinion filed in this court February 19, 1923, not yet reported). The effect of the reversal of the decree was to vacate it and set it aside. (Ure v. Ure, 223 Ill., 454.)

The order committing appellant to jail being dependent upon the decree is therefore void and is reversed. (Madson v. Clark, 166 Ill. App. 441).

REVERSED.

Matchett, P. J., and McSurely, J., concur.

BATTLE BROOK,
Plaintiff,

vs.

MARGA BROOK,
Defendant.

BRIEF FOR PLAINTIFF-APPELLANT
IN MAIN SUMMARY.

II. CONTINUE ACTUALLY DEPENDENT ON PLAINTIFF'S WORK.

This is an action for an order of the Family Court of Oahu finding conditions precedent, upon remand, to just the Failure to pay monthly, Family Court, Oahu, this city, County of Oahu to be entitled to a decree for divorce. Plaintiff-appellant is the wife. He argued he (sic) prior to publication the decree for separate maintenance was provided on the ground that the decree modifying the Family Court modifies the living expenses and more than maintenance of the child. (Cases in point, Opinion (Ital in this Court Entitled 54, 1977, not yet reported). The effect of the provision of the decree was to modify it and not it modify. (See v. Cox, 400 Ill., 331.)

The order modifying conditions is (sic) being dependent upon the decree is interpreted and is erroneous. (Bonnie v. Clark, 130 Ill. App. 441).

Continued.

Respectfully, A. J., and Respectfully, J., Counsel.

241 - 28517

(3487a)

HATTIE BOUCEK,
Appellee,

vs.

FRANK BOUCEK,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

232 I.A. 310

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit court of Cook County committing appellant, Frank Boucek, to jail for failure to pay appellee, Hattie Boucek, his wife, money alleged to be due her under a decree for separate maintenance granted to the wife. On appeal to this court by appellant the decree for separate maintenance was reversed on the ground that the decree contained no finding that appellee was living separate and apart from appellant without her fault. (Case No. 27896. Opinion filed in this court February 19, 1923, not yet reported). The effect of the reversal of the decree was to vacate it and set it aside. (Ure v. Ure, 223 Ill., 454).

The order committing appellant to jail being dependent upon the decree is therefore void and is reversed. (Madsen v. Clark, 166 Ill. App., 441).

REVERSED.

Matchett, P. J., and McSurely, J., concur.

242 - 28518

(34882)

HATTIE BOUCEK, Appellee, vs. FRANK BOUCEK, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

232 I.A. 516

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit court of Cook County committing appellant, Frank Boucek, to jail for failure to pay appellee, Hattie Boucek, his wife, money alleged to be due her under a decree for separate maintenance granted to the wife. On appeal to this court by appellant the decree for separate maintenance was reversed on the ground that the decree contained no finding that appellee was living separate and apart from appellant without her fault. (Case No. 27896, Opinion filed in this court February 19, 1923, not yet reported). The effect of the reversal of the decree was to vacate it and set it aside. (Ure v. Ure, 223 Ill. 454).

The order committing appellant to jail being dependant upon the decree is therefore void and is reversed. (Madson v. Clark, 166 Ill. App. 441).

REVERSED.

Matchett, P. J., and McSurely, J., concur.

BATTIE HOUSE,
Appellee,

vs.

STATE OF OHIO,
Appellant.

APPEAL FROM SUPREME COURT
OF OHIO COURT.

SUPPLEMENTAL

No. Motion to dismiss sustained for failure to use diligence.

This is an appeal from an order of the Supreme Court of Ohio denying prohibition. Under Section 14 Jud. Code failure to use diligence in the matter, this alone, would be ground for the order. In spite of the order by which the Supreme Court of Ohio was directed on the ground that the above mentioned statutes were in the proper and equal from consideration without the record. Therefore, Section 1911 in this court Federal or, rule, not jurisdiction. The effect of the decision of the Supreme Ohio is clear. It was, not in question.

The other questions involved in this case, Separation upon the merits is therefore held not to be presented. Johnson v. State, 144 U.S. 460, 461.

DISMISSED.

Respectfully, F. J., and Attorney, Ohio.

251 - 28527

(3489a)

LEONORA OSBORN,
Appellee,

vs.

EMMA REARICK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

232 I. A. 316

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of the City of Chicago, in favor of appellee, in an action of forcible entry and detainer. In her complaint appellee alleges that she is entitled to the possession of the first apartment of a certain two-apartment building, and that appellant unlawfully withholds the possession of the apartment from her. The case was tried before a jury. At the close of all the evidence the court directed a verdict for appellee. The evidence shows that the owner of the premises conveyed them by warranty deed to appellee on July 15, 1918. The owner was in actual possession of the premises at the time and resided in the first apartment until about July 26, 1918, when he moved out. On the date that the owner moved out appellee, appellant, her husband C. C. Rearick, and her mother all moved into the first apartment, which the owner had vacated. At the time of the conveyance to appellee the second apartment was occupied by a tenant. The tenant remained in the apartment until October 1, 1918, when he moved out. Appellee then left the first apartment, in which she had been living, and moved into the second apartment. After the former owner of the premises left, the tenant of the second apartment paid his rent to appellant, who gave it to her husband. The husband died on August 1, 1922. On August 22, 1922, appellee served a written notice on appellant

LEONORA GREEN,
Appellee,

vs.

ZENA GRAVES,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

282 - 216

Mr. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of the City of Chicago, in favor of appellee, in an action of forcible entry and detainer. In the complaint appellee alleges that she is entitled to the possession of the first apartment of a certain two-apartment building, and that appellant unlawfully withholds the possession of the apartment from her. The case was tried before a jury. At the close of all the evidence the court directed a verdict for appellee. The undisputed fact was that the owner of the premises had rented it from by month, and by notice on July 15, 1916. The tenant was to begin occupation of the premises at the 1st and vacate on the first succeeding month about July 30, 1917, when he moved out. On the date that the tenant moved out appellee, appellant, her husband, G. F. Graves, and her mother all moved into the first apartment, which the owner had vacated. At the time of the occupancy in question the second apartment was occupied by a family. The tenant rented in the apartment until October 1, 1917 when he moved out. Appellee then left the first apartment, in which she had been living, and moved into the second apartment. After the former owner of the premises left, the landlord of the second apartment paid the rent to appellant who gave it to her husband. The landlord died on August 1, 1918. On August 20, 1918, appellee served a written notice on appellant

demanding immediate possession of the first apartment, which was then occupied by appellant and her mother. Counsel for appellant offered to prove the following facts: "That C. C. Rearick and the plaintiff for many years prior to 1918 were associated together in business under a partnership arrangement and occupied under such an arrangement a previous two-flat building, title to which was held by the plaintiff; that this building was sold and the present building in controversy in this suit purchased, and that thereupon the parties went into the occupancy of the building under the same agreement, C. C. Rearick and the defendant in this case and C. C. Rearick's mother going into the occupancy of the first flat of the premises and the plaintiff living there with them for a short time until the occupant of the upper flat, who was a tenant of the grantor, Krogh, vacated, after which the plaintiff moved in there and remained there since. That the taxes were paid on the property - one-half by the plaintiff and one-half by C. C. Rearick; that all repairs on the premises were made, one-half by each of said parties; that the tenant who was in the occupancy of the upper flat at the time the parties went into possession, as stated, paid his rent to the defendant, Emma Rearick, who in turn paid it to C. C. Rearick, her husband, and that this covered all the rent paid during the time that said tenant remained in possession; that a document is in existence bearing the true signature of plaintiff, which is now produced for the inspection of the court and offered in evidence, which reads as follows:

'Chicago, April 19, 19[illegible].

Pay to the order of Christy C. Rearick an undivided one-half interest in Lots 12 and 13 in Koster & Zander's Section Line Subdivision of the Northwest quarter of the Northwest quarter of Section 27, Township 40 North, Range 13, East of the Cook County,

demanding immediate possession of the first mortgage, which was then owned by appellant and his mother. Counsel for appellant offered to prove the following facts: That C. E. Jenkins had the plaintiff for many years prior to 1910 and maintained relations in business under a particularly attractive and successful leader such as appeared a previous two-line building, 2/3 of which was held by the plaintiff; that this building was and the present building is conveyed in this suit purchased, and that therefore the parties had had the opportunity of the building under the same arrangement, C. E. Jenkins and his partner in this case and C. E. Jenkins's mother owing half the property of the first flat of the premises and the plaintiff lived, there with them for a short time until the purchase of the house that, she was a tenant of the premises; Jenkins, wanted, after being the plaintiff moved in there and occupied fifty years. That the taxes were paid on the property - assessed by the plaintiff and one-half by C. E. Jenkins; that all repairs on the premises were made, one-half by some of said parties; that the tenant, Mrs. Jenkins, occupying at the upper time at the time the parties had this possession, as stated, paid rent to the plaintiff, then Jenkins, the in turn paid it to C. E. Jenkins, the tenant, and that this covered all the rent paid during the time that said tenant resided in premises; that a document in evidence showing the true signature of plaintiff, which is now produced for the inspection of the court was signed in evidence, which reads as follows:

"Chicago, April 30, 1910.

For in the order of Chicago C. Jenkins an undivided one-half interest in lots 32 and 33 in Jenkins & Jenkins's Subdivision of the southwest quarter of the northwest quarter of Section 27, Township 39 North, Range 13, East of the Third Princ.

Illinois. (3136-8 North Kilpatrick avenue.)'

That said C. C. Rearick conducted the general co-partnership business in the name of the plaintiff, using the name 'L.' or 'N.' Osborn, and in some cases 'Nathan Osborn;' that supplies and repairs for the building were furnished under the name of 'Mr. Osborn;' that on different occasions the plaintiff referred to the property as 'Our property;' that said C. C. Rearick was never known to pay any rent to the plaintiff for the occupancy of the premises; that he died on August 1, 1922; that the defendant, Emma Rearick, is his surviving wife; that he left no children; that she is his heir-at-law, or one of his heirs-at-law, and that he left him surviving his mother; that the defendant and C. C. Rearick's mother are in possession of the premises; and that C. C. Rearick took an active and principal part in the purchase of the property."

The offer of counsel for appellant was denied. Appellant then rested.

Appellant's principal assignment of error, and the only one seriously argued by counsel for appellant, is that the court erred in admitting in evidence the deed from the former owner of the premises to appellee. Counsel for appellant argues that the admission of the deed involved an inquiry into the title of appellee, and that the title of neither party is a subject for determination in an action of forcible entry and detainer. Counsel is undoubtedly correct in his contention that the titles of the parties cannot be inquired into. But the admission of the deed did not raise the question of the title of the fee, and the record shows that the court did not consider the deed in that aspect. The deed merely served to show the character and extent of appellee's possession. For that purpose it was admissible. Huftalin v. Misner, 70 Ill. 205, 207; Parson v. Herr,

Illinois. (2156-6 Corpus Christi Statutes.)'

That said G. G. Hamlock contracted the general co-partnership business in the name of 'G. Hamlock', using the stand 'G.' or 'H.' Cabore, and in some cases 'Cabore Cabore;' that supplies and vouchers for the building were furnished under the name of 'Mr. Cabore;' that on different occasions the plaintiff referred to the property as 'Hamlock's;' that said G. G. Hamlock was never known in any way such to the plaintiff for the accuracy of the premises; that he died on August 5, 1907; that the defendant, Mary Hamlock, in his surviving wife; that he left no children; that all is his bright-law, or son of his surviving-law, and that he left his surviving his mother; that the defendant and G. G. Hamlock's mother are in possession of the premises; and that G. G. Hamlock took no active and principal part in the purchase of the property.'

The offer of proof for appellant was stated. Impaling then ruled.

Hamlock's unknown assignment of error, and the only one seriously argued by counsel for appellant, is that the court erred in admitting in evidence the deed from Mary Hamlock owner of the premises to Hamlock. Counsel for appellant argues that the admission of the deed injured no property into the title of appellee, and that the title of neither party is a matter for determination in an action of forcible entry and detainer. Counsel is undoubtedly correct in his contention that the title of the parties cannot be inquired into. But the admission of the deed did not raise the question of the title of the fee, and the record shows that the court did not consider the deed in that regard. The deed merely served to show the character and extent of appellee's possession. For that purpose it was admissible. Lubinski v. Lemmer, 70 Ill. App. 407; Kerner v. Hunt.

53 Ill. 144, 149; Rockhold v. Deering, 122 Ill. App. 194, 197; Ragor v. McKay, 44 Ill. App. 79, 80, 81. Appellee was in actual possession of the second apartment of the building and appellant occupied the first apartment. The deed to appellee, which was executed before either appellant or appellee moved into the building, indicates the extent of appellee's possession and also the character of her possession. On the evidence it appears that appellant occupies the apartment only as a licensee or tenant at will. Dunstedter v. Dunstedter, 77 Ill. 580, 582; Evans v. Evans, 163 Ill. App. 203, 209. And the fact that appellee had a deed to the premises before either she or appellant moved into the building is a circumstance to be considered in determining that question.

The relevancy of the deed, not as evidence of title but to explain appellee's right of possession as against appellant's occupancy, is made more apparent when it is considered in connection with the fact that the evidence does not show that appellant ever paid any rent to appellee, or had any lease from appellee, or held possession through any privity between appellant and the former owner of the premises.

The cases of Thomasson v. Wilson, 146 Ill. 384; State v. Eisenmeyer, 94 Ill. 96; Peters v. Balke, 170 Ill. 304; Palmer v. Frank, 169 Ill., 90; Wolf v. Jurgenson, 185 Ill. App. 346; Benusaitis v. Radawiczus, 172 Ill. App. 259, cited by counsel for appellants as authorities for the contention that the deed was inadmissible, are not, in our opinion, contrary to the general rule that the deed was admissible, not to prove title, but to show the character and extent of appellee's possession.

The court correctly refused to allow appellant to introduce evidence of the alleged facts contained in appellant's offer. The proposed facts presented an equitable defense, and it is well settled in this state that equitable defenses cannot

32 III. 141, 142; Bradfield v. Dearing, 147 Ill. App. 188, 197; Hager v. Cozzo, 4a Ill. App. 73, 80. Possession was in equal possession of the second purchaser at the filing the applicant occupied the first apartment. The mere fact of possession, which was exercised further and or modified or applied moved into the building, indicate the extent of equality's possession and also the character of the possession. In the evidence it appears that equality assigns the apartment only on a license or tenant at will. Equability v. Dorsiglia, 71 Ill. App. 88; Fyers v. Tyler, 147 Ill. App. 174, 178. But the fact that equality had a deed to the premises before either one of equality moved into the building is a circumstance to be considered in determining that question.

The relationship of the deed, not in existence of title but in equity equality's right of possession as against equality's ownership, is only operated when it is established in connection with the fact that the equality has not shown that equality ever said or that is equality, or that equality issue from equality, or held possession through any activity between equality and the former owner or the equality.

The case of Dougherty v. Tilson, 141 Ill. 184; State v. Lawrence, 74 Ill. 32; Peters v. Sales, 172 Ill. 304; Palmer v. Fuss, 180 Ill. 16; Tait v. Lawrence, 147 Ill. App. 46; Lagomarsino v. Dougherty, 172 Ill. App. 70, also by counsel for equality as authorities for the proposition that the deed was inoperative, are not, in our opinion, contrary to the general rule that the deed was effective, not to give title, but to show the character and extent of equality's possession.

The court correctly refused to allow equality to introduce evidence of the alleged facts tendered in equality's offer. The proposed facts presented no equity in equity, and it is well settled in this state that equitable interest cannot

be set up in an action of forcible entry and detainer. St. Louis Stock Yards v. Wiggins Ferry Co., 102 Ill., 514, 520; O'Brien v. O'Brien, 195 Ill. App. 346, 347; Illinois Central R. R. Co. v. B. & O. & C. R. R. Co., 23 Ill. App. 531, 550. Furthermore, this offer, if allowed, would have raised the question of title, the very question which counsel for appellant is correctly contending cannot be inquired into in actions of forcible entry and detainer. Thomas v. Olenick, 237 Ill., 167, 168. Counsel for appellant recognizes the inconsistency of his position when he states that the "error of the trial judge consisted not so much in refusing defendant's offer to show an equitable title to the premises as in allowing the question of title to be introduced on behalf of plaintiff."

Counsel for appellant complains that it would "seem to be most extraordinary, if it be the law, that one who had rightfully entered into possession of premises under some agreement with the owner, whereby the person entering had an interest in the premises, whether legal or equitable, can be compelled in an action of this kind to vacate and fight his way back into possession through a court of equity." The resort to equitable procedure, however, by one claiming such rights, must be followed as long as our system of law recognizes the distinction between courts of equity and courts of law.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

be set up in an action of foreclosure under the statutes. Cf. Louisiana Stamp Works v. Thomas Lacey Co., 107 Fed., 914, 920; Fletcher v. O'Hara, 108 Ill. App. 620, 627; Illinois Central R. R. Co. v. R. R. Co., 27 Ill. App. 500, 501, 502. Nevertheless, this offer, if allowed, would have raised the question of title, the very question which usually for equitable in currently wrongdoing cannot be imposed into an action of replevin only and damages. Thomas v. Winston, 117 Ill., 157, 158. Lawrence for appellant recognizes the inconsistency of his position when he states that the "error of the trial judge consisted not so much in refusing defendant's offer to show an equitable title to the premises as in allowing the question of title to be introduced on behalf of plaintiff."

Counsel for appellant contends that it would "seem to be most extraordinary, if it be the law, that one who has illegally entered into possession of premises under some agreement with the owner, thereby the person entitled and an interest in the premises, whether legal or equitable, can be compelled in an action of this kind to realize that fact and can take into possession through a court of equity." The remedy in replevin procedure, however, by one claiming such right, must be followed as long as our statute of law recognizes the distinction between courts of equity and courts of law.

For the reasons stated the judgment is affirmed.

Judgment affirmed.

Hardman, P. J., and Dougherty, J., concur.

291 - 28567

(349 Da)

J. A. PRINCE and H. F. DOERSCHNER,
Copartners Doing Business as
Prince Elevator Company,
Appellee,

vs.

WILLIAM WALLER, Jr.,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2 3 2 1 A - 3 1 6

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The action in this case was brought by appellee to recover $311.60 for services rendered to appellant by appellee. The statement of claim of appellee alleges in substance that appellee repaired an elevator for appellant which appellee had installed in a building owned by appellant. The statement also alleges that it was agreed that the owner of the premises would protect the machinery after being delivered at the building. The affidavit of merits of appellant denies that he is indebted to appellee, and alleges that appellee "has received payment in full." The case was tried before a jury and a verdict was rendered in favor of appellee for $311.60. Judgment was entered on the verdict.

The grounds on which appellant relies for reversal, as stated by counsel for appellant, are that "there was no evidence to charge the defendant; and that the evidence clearly shows the payment in full of the claim." The undisputed facts are briefly as follows: Appellee, the Prince Elevator Company, a partnership composed of J. A. Prince and H. F. Doerschner is engaged in the business of manufacturing and installing elevators. Appellee installed an elevator in a building which was in the course of construction under the supervision of an architect named Ohrenstein, and which was alleged to be owned by appellant. The work of installation was completed with the exception of connecting two wires to the switch box which would "not take more than half a minute."

(34 Pa)

F. A. Philips and G. F. Westinghouse,
Operators Sales Agents of
Philips Elevator Company,
Appellees.

vs.

William Pullen, Jr.,
Appellant.

APPEAL FROM SUPERIOR
COURT OF ALBANY.

2871 - 1/6

Mr. Justice Brewster delivered the opinion of the court.

The action in this case was brought by appellee to recover $211.00 for services rendered in connection by appellee. The statements of fact of appellee allege in substance that appellee imported an elevator for building which appellee had installed in a building owned by appellant. The statement also alleges that it was agreed that the owner of the premises would protect the machinery after being delivered at the building. The efficiency of service of appellant during that it is intended to operate, and alleges that appellee "has received payment in full." The case was tried before a jury and a verdict was rendered in favor of appellee for $211.00. Judgment was entered on the verdict.

The grounds on which appellant seeks for reversal, as stated by counsel for appellant, are that "there was no evidence to charge the defendant; and that the evidence clearly shows the payment in full of the claim." The undisputed facts are briefly as follows: Appellee, the Philips Elevator Company, a partnership composed of F. A. Philips and G. F. Westinghouse is engaged in the business of manufacturing and installing elevators. Appellee imported an elevator in a building which was in the course of construction under the supervision of an architect named Greenwald, and which was alleged to be owned by appellant. The work of installation was completed with the exception of connecting two wires to the switch box which would "not take more than half a minute."

After the elevator had been in the building for about a week or ten days Doerschner attempted to connect it with the switch and found that the elevator would not run. A chisel had been driven into the armature by some one as the result, presumably, of labor troubles between the elevator men and the electricians. The necessary repairs were made by appellee. Whether appellee was employed by appellant to make the repairs or whether appellee did the work at its own expense is a disputed question of fact. According to Doerschner, when he discovered the injury to the machinery he called Ohrenstein, informed him of the existing condition, told him that he, Doerschner, would not make the necessary repairs until he got Ohrenstein's approval, and that Ohrenstein said: "Well, take out the motor and repair it and we will pay for it. Do it as quick as you possibly can." Doerschner testified that Ohrenstein wanted to know what it would cost and that he, Doerschner, said he "could not tell him until we had the motor operating," that it would "not make very much difference on the price anyway." Doerschner testified that Ohrenstein said, "All right, we will pay the bill." Ohrenstein testified that when Doerschner told him of the injury to the machinery he, Ohrenstein, said: "Go ahead and fix it;" that Doerschner said: "Well, we should not be made to pay;" and that he, Ohrenstein, said: "It is your own fault. We didn't start any trouble between the elevator men and the electricians." In a written contract between appellant and appellee, in regard to the construction of the elevator and its installation, it is provided that appellant was "to protect the machinery after delivered at the building." The evidence shows that appellant had a watchman at the building.

Counsel for appellant maintains that appellee has not shown that appellant failed to protect the machinery, or that appellant's watchman was in any way negligent. We do not think that the question of negligence is involved in the controversy.

After the struggle had been on the building for about a week or two days Mazzuchelli attempted to persuade it with its writing and found that the director would not run. A friend had seen during this the attempt to have not at the result, presumably, of labor trouble between the [illegible] and the electricians. The necessary repairs were made by [illegible]. Further negotiations engaged in attempt to make the repairs or another repairs did the work at its expense is a disputed question of fact. Appeals to Bernstein, upon he discovered the injury to the [illegible] he [illegible] [illegible], informed him of the existing [illegible], told him that he, Bernstein, would not make the necessary repairs until it was [illegible]'s property, and that Bernstein said: "Well, [illegible] the water and repair it and we will pay for it. We is we [illegible] we [illegible]." Bernstein [illegible] that [illegible] wanted to know what it would cost and that he, Bernstein, said he "would not tell us what we had the repairs [illegible]," that he said "not more than [illegible] to the [illegible] [illegible]." Bernstein [illegible] that Bernstein said: "All right, we will pay for this." [illegible] Bernstein told the [illegible] in the [illegible] to, Bernstein, said: "Do what [illegible] fix it;" that Bernstein said: "All, we [illegible] not to make [illegible]" and that he, Bernstein, said: "[illegible] your [illegible]. We [illegible] [illegible] [illegible] the director [illegible] the [illegible]." In a [illegible] [illegible], appellant and [illegible], in [illegible] to the [illegible] of the director and [illegible] the [illegible], it is [illegible] that [illegible] "is [illegible] the [illegible] after [illegible] at the [illegible]." The evidence shows that [illegible] that a [illegible] at the [illegible].

Counsel for [illegible] maintains that [illegible] has not [illegible] that [illegible] failed to [illegible] the [illegible], or that [illegible]'s [illegible] was in [illegible]. It is not [illegible] that the question of [illegible] is [illegible] in the [illegible].

The action was not brought on the written contract in regard to the installation of the elevator to recover damages for any alleged negligence on the part of appellant growing out of that contract. It was brought on an alleged separate, independent verbal contract to recover the amount claimed to be due to appellee for repairing the machinery of the elevator. The question of negligence could only arise in another and different action. An action, for example, on a contract between the parties which rendered appellant liable to appellee for injuries to the machinery which were occasioned by appellant's negligence to protect the machinery after its delivery. The evidence, however, in the case at bar does not show any such contract. The provision in the contract in regard to the installation of the elevator requiring appellant to protect the machinery after it was delivered, relieves appellee of that duty, but gives appellee no right of action against appellant for appellant's negligence in not protecting the machinery. If appellee was not under any legal obligation to make the repairs, and if an independent contract was in fact entered into between appellant and appellee for the making of the repairs, appellee would then stand in the same relation to appellant as would a third party that might have been employed by appellant to make the repairs; and it would be immaterial whose negligence caused the injuries which necessitated the making of the repairs. If appellant had employed a third party to make the repairs, it is obvious that appellant could not excuse himself for not paying for the repairs on the ground that the injuries to the machinery were not due to his negligence.

The first question to be determined is whether appellee was under any legal duty to make the repairs. The evidence shows that the injury to the machinery was done after the elevator had been delivered and completely installed with the exception of connecting the wires in the switch box. This would have taken only

the action was not brought on the written contract in regard to the installation of the elevator to recover damages for any alleged negligence on the part of appellant growing out of that contract. It was brought on an alleged warranty, independent verbal contract to repair the second elevator by the to operate for remedying the machinery of the elevator. The question of negligence could only arise in another and different action. An action, for example, on a contract between the parties for a required specified liability to repair for injuries to the machinery which were occasioned by appellant's negligence in repairing the machinery after the delivery. The evidence, however, in the case at bar does not show any contract. The provision in the contract in regard to the installation of the elevator requiring appellant to repair the machinery after it was delivered, relieves appellee of that duty, but gives appellee no right of action against appellant for appellant's negligence in not protecting the machinery. If appellee has not made any legal obligation to make the repairs, and if an independent contract was in fact entered into between appellant and appellee for the making of the repairs, appellee would then stand in the same relation to appellant as would a third party that might have been employed by appellant to make the repairs, and it would be immaterial whose negligence caused the injuries which necessitated the making of the repairs. If appellant had employed a third party to make the repairs, it is obvious that appellant could not escape liability for not paying for the repairs on the ground that the injuries to the machinery were not due to his negligence.

The first question to be determined is whether appellee was under any legal duty to make the repairs. The evidence shows that the injury to the machinery was done after the elevator had been delivered and completely installed with the exception of connecting the wires in the switch box. This would have taken only

about "half a minute." The written contract provided that appellant should "protect machinery after delivery at building." We are of the opinion that appellee was not under any legal duty to make the repairs. Was a separate, independent verbal contract entered into between appellant and appellee in regard to the repairs? On the facts relating to this question the jury found in favor of appellee. In our opinion the verdict was not manifestly against the weight of the evidence.

It is further contended by counsel for appellant that "the evidence clearly shows the payment in full of the claim." The contention of counsel is based on the defense of an accord and satisfaction. The evidence shows that there were two separate transactions between appellant and appellee. One related to the installation of the elevator by appellee and the other to the repairs to the elevator made by appellee after the installation of the elevator. At the time the repairs were made appellant owed appellee a balance of $150 on the contract for the installation of the elevator. That amount was not in dispute. It was admitted to be due. The disputed amount was the bill for the repairs. Appellant paid appellee the balance of $150 due for the installation of the elevator and appellee signed a waiver and release of any lien on the building and premises. At this time, according to the testimony in behalf of appellant, which is undisputed, appellee expressly stated that the claim for repairs would be waived, and that the payment of the $150 would be accepted as a final settlement of all the demands of appellee. The facts being undisputed, the only question presented is one of law. Ennis v. Pullman Palace Car Company, 165 Ill., 161, 182. The rule is a familiar one that in order that there may be an accord and satisfaction in regard to a claim, the claim must be in dispute. The Farmers and Mechanics Life Association v. Caine, 224 Ill. 599,

about "half a minute." The written contract provided that neither should "protect gratuitously after delivery of building."

In are of the opinion that appellee was not under any legal duty to make the repairs. The a contract, independent verbal contract entered into between appellant and appellee to repair to the repairs? On the issue relating to this question the jury found in favor of appellee. In our opinion the verdict was not manifestly against the weight of the evidence.

It is further contended by appellant for reversal that "the evidence clearly shows the judgment is full of the claim." The contention of counsel is based on the failure of appellee and defendants. The evidence shows that there was no express agreement between appellant and appellee. The re- lated to the installation of the elevator by appellee and the other is the repairs to the elevator made by appellee after the installation of the elevator. At the time the repairs were made appellant owed appellee a balance of $[illegible] on the contract for the installation of the elevator. This amount was not in dispute. It was admitted to be due. The disputed amount was the cost for the repairs. Appellant paid appellee the balance of $[illegible] for the installation of the elevator and appellee signed a release and release of any lien on the building and premises. In this case, according to the testimony in behalf of appellee, this is un- disputed, appellee expressly stated that the claim for repairs would be waived, and that the payment of the $[illegible] would be ac- cepted as a final settlement of all the damages of appellee. The trial judge undertaken, the only question presented is one of law. Davis v. Pulaski Police Jur Company, 148 Ill., 181, 185. The rule is a familiar one that in order that there may be an accord and satisfaction in payment of a claim, the claim must be in dispute. The Farmers and Laborers Life Association v. Young, 224 Ill. 628,

607; Bay-Snellwitz Lumber Co. v. Serrell, 177 Ill. App., 30, 36; Capital City M. F. Ins. Co. v. Detwiler, 25 Ill. App. 670. In the case at bar the claim of $150 that was paid by appellant was not in dispute. In paying that claim appellant only paid what he admitted was legally due to appellee. There was no accord and satisfaction in that transaction. The precise question is whether the further fact that appellee accepted the $150 in full payment of all demands and expressly waived the claim for repairs constitutes an accord and satisfaction. On the principles announced in the authorities such a case does not form the basis for an accord and satisfaction. The payment of the $150, the amount admitted to be due, could not be made a consideration for the release of the claim for repairs. Hayes et al. v. Massachusetts Life Ins. Co., 125 Ill., 626, 638; Martin v. White, 40 Ill. App. 281, 288, 289; Bostrom v. Gibson, 111 Ill. App. 457, 458; Mance v. Hossington, 205 N. Y. 33, 36. How could the doing of that which appellant was bound by law to do be made the consideration for discharging him from doing something else which he agreed to do? Martin v. White, supra. In Mance v. Hossington, supra, it was expressly held that the payment of an admitted liability is not a payment of or a consideration for an accord and satisfaction of another and independent liability.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

977; Ser-Quality Lumber Co. v. Lorenzo, 177 Ill. App., 34, 40; Capital City S. S. Inc. Co. v. Dentzler, 21 Ill. App. 620. In the case at bar the claim of $150 that was paid on arrearage was not in dispute. In equity that claim constitutes only what be admitted was legally due or payable. There was no actual satisfaction in that transaction. The precise question is whether the further fact that appellee asserted the right to full payment of all insurance due contractually vested the claim for damages against an account and indebtedness. On the evidence submitted in the authorities such a case does not lend the basis for an account and settlement. The payment of the $150, was amount admitted to be due, would not be made a consideration for the release of the claim for damages. Lucas et al. v. Commercial Life Ins. Co., 178 Ill., 624, citing Martin v. Martin, 40 Ill. App. 484, 490; Lawton v. Gibson, 111 Ill. App. 677, 684; Gorse v. Gallagher, 201 M. 7. 22, 24. Nor could the doing of that which appellant was bound by law to do be made the consideration for discharging the from doing something else which he agreed to do. Durkin v. Phillips, Supra. In Gorse v. Gallagher, Supra, it was accordingly held that the payment of an admitted liability is not a payment of or a consideration for an account and satisfaction of mutual and in-dependent liability.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Kennedy, J., concur.

24 - 28276

(349 a)

SYLVIA WOLIN,
Defendant in Error,

vs.

JACOB A. LEWITZ,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

23 3 1 - 116

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff's action was for conversion of a fur coat, and upon trial by the court defendant was found guilty as charged in the statement of claim and judgment was entered for $300.

The testimony tended to show that defendant is a furrier and plaintiff's coat was left with him to be relined and stored. Defendant placed it in his vault, which is of concrete construction with a steel door and a combination safety lock with a burglar alarm system attached. Defendant also employed a watchman to guard his store. The store seemed to have been wired with a burglar alarm system except in the wall next to an adjoining store. Burglars entered the vault through this other store, breaking through the wall with electric drills, and stole merchandise, including plaintiff's coat.

A bailee for hire is liable for loss only in case it is caused by his negligence. The evidence fails to show any negligence on the part of defendant which caused the loss of plaintiff's coat.

Plaintiff makes no claim of loss through negligence, but seeks to support the judgment upon the ground that there was an agreement between the parties for insurance. That question was not in the case. The action was for conversion, not upon a contract of insurance.

There is no merit in the suggestion by plaintiff's counsel that there was no motion made for a new trial or an exception taken by defendant. As the case was tried by the court, neither

KEARIA WALLS,
Defendant in Error,

vs.

JOHN A. DEWING,
Plaintiff in Error,

Error to Superior Court
of Alameda.

Mr. Justice McCombs delivered the opinion of the Court.

Plaintiff's action was for conversion of a Ford sedan, and upon trial by the court defendant was found guilty as charged in the statement of claim and judgment was entered for $300.

The testimony tended to show that defendant is a farmer and plaintiff's son was left also to be relieved and stored. Defendant leased it in his yards, which is of concrete construction with a steel door and a combination entry, from which a burglar alarm system stretched. Defendant also employed a watchman to guard the place. The alarm wires ran into a bell which with a burglar alarm system service in the city and it is activated by burglars entering the vault through the alarm floor, breaking through the wall with electric drills and electric acetylene, involving plaintiff's car.

A bailee for hire is liable for loss only in case it is caused by his negligence. The evidence fails to show any negligence on the part of defendant which caused the loss of plaintiff's car.

Plaintiff makes no claim of loss through negligence, but seeks to support the judgment upon the ground that there was an agreement between the parties for insurance. That question was not in the case. The action was for conversion, not upon a contract of insurance.

There is no merit in the contention by plaintiff's

and that there was no motion made for a new trial or to vacate judgment by defendant. In the case as tried by the court, neither

a motion for new trial nor exception to the judgment was necessary. However, the record does show an exception to the finding and to the judgment. The trial court evidently misconceived the character of the action and entered an erroneous judgment based thereon.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

a motion for new trial nor exception to the judgment was necessary. However, the record does show an exception to the filing and to the judgment. The trial court evidently misconstrued the character of the action and entered an erroneous judgment based thereon.

The judgment is reversed and the cause remanded.

ENTERING LAW DEPARTMENT.

Katchmark, J. J., and Johnson, J., concur.

39 - 28302

(34922)

S. S. BERRY,
Appellee,

vs.

EDWIN O. GROVER,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

232 I.A. 617

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for $1150 rendered upon a directed verdict for plaintiff in a suit brought to recover real estate commissions.

Plaintiff, a licensed real estate broker in Chicago, had a conversation with defendant relative to exchanging defendant's property in Maine for Chicago income-paying property, and defendant told plaintiff to try to find someone who would enter into such a deal. After interviewing several owners of property the plaintiff got in touch with a Mr. H. Emmerman, who said he would consider exchanging his twenty-four flat building on Sunnyside avenue for defendant's Maine property. Plaintiff and defendant met at the flat building and inspected the same generally, including the basement and boiler, and had interviews with the janitor and several of the tenants. Plaintiff gave defendant a statement showing the rental from the building, the number of rooms, expense items, amount of mortgage, and an estimate as to what the building would net every year. Defendant seemed satisfied with the property and told plaintiff to try and effect an exchange for his property in Maine. Plaintiff interviewed Emmerman, who indicated a willingness to inspect the Maine property, but subsequently defendant said that his wife did not want him to sell the Maine property, and that exchange was not effected. Defendant then asked plaintiff to try to make an exchange for some property in New Jersey, and gave plaintiff a map and description with figures as to the

T. H. DUNN, Appellee,	
vs.	
EDWIN C. MOYER, Appellant.	

Mr. Justice Mechem delivered the opinion of the court.

This is an appeal by defendant from a judgment for $1250 rendered upon a directed verdict for plaintiff in a suit brought to recover real estate commissions.

Plaintiff, a licensed real estate broker in Chicago, had a conversation with defendant, relative to combining defendant's property in Salem for Chicago business-building property, and defendant told plaintiff to try to find someone who would enter into such a deal. After introducing several persons to property the plaintiff got in touch with a Mr. T. Donovan, who said he would consider exchanging his twenty-four flat building on Sheffield avenue for defendant's Salem property. Plaintiff and defendant met at his flat building and discussed the case generally, including the basement and boiler, and had interviews with the janitor and agent of his tenants. Plaintiff then informed a stranger showing the rentals from the building, the number of rooms, separate items, amount of mortgages, and so on, relative to the what the building would net every year. Defendant became satisfied with the property and told plaintiff to try and effect an exchange for his property in Salem. Plaintiff interviewed Donovan, who informed a stranger to inspect the Salem property, but subsequently testified that he did not want the Salem property, and that exchange was not effected. Defendant then asked plaintiff to try to make an exchange for some property in New Jersey, and gave plaintiff a map and description with figures as to the

value of this property. Plaintiff took these to Emmerman and informed him that Grover did not wish to exchange the Maine property, but had this other property in New Jersey. Emmerman promised to investigate, and some days later informed plaintiff that he would be willing to make the exchange, and that plaintiff should get defendant to sign a contract to this effect. Thereupon, by a document dated December 11, 1916, signed by defendant and delivered to plaintiff, the defendant agreed to purchase the flat building at 839-45 Sunnyside avenue, subject to a first mortgage, giving therefor a second mortgage for $18,000, $4,000 cash and 51% of the stock of the Overbrook Land Company, which owned the New Jersey land described in the document as 35 acres and platted into lots according to the accompanying map. The remaining shares of the stock were held by one other party. The offer by defendant provided that the taxes on both properties should be paid by the present owners, and that should plaintiff sell the property as above outlined, defendant agreed to give him "the usual Chicago Real Estate Board commission." This offer was to be good to and including December 23, 1916.

Under date of December 13, 1916, Emmerman gave plaintiff a writing repeating the terms of defendant's proposal and agreeing to exchange his Sunnyside avenue flat building upon the terms and conditions stated in defendant's written offer. Emmerman agreed, in the event the deal was consummated, to pay plaintiff a commission of $2,000. This offer was conditioned upon there being delivered to him a signed contract embodying these conditions "not later than 5 p. m., Thursday, December 14, 1916." On the following day, December 14, Emmerman accepted defendant's offer by writing on his letter of December 11 the words, "Accepted 4:15 p. m., December 14, 1916. H. Emmerman." December 16 plaintiff wrote to defendant stating that Emmerman had agreed in writing to make the exchange in accordance with the conditions stated in defendant's letter and had accepted the proposition as outlined in defendant's letter of the 11th,

value of this property. Plaintiff said there is considerable dispute as to what Grover did or did not do to enhance the value of the property, but has title other property in the future. Bowman promised to investigate, and some days later stated plaintiff that he would be willing to make the exchange, and that plaintiff should get an abstract to show a contract in this effect. Thereupon, by a document dated September 11, 1972, signed by defendant and delivered to plaintiff, the defendant agreed to exchange the four buildings on Grover's Emergency avenue, subject to a first mortgage, giving therefor a second mortgage for $18,000, or, if the stock of the Overbrook Land Company, which owns the two factory lots located in the township on 23 acres and jointly owned by defendant in the accompanying map. The property owners of the stock were held by one other party. The offer by defendant provided that the terms of both properties would be paid by the present owners, but that should plaintiff sell the property in above instance, defendant agreed to give him the usual commission that realty land brokerage. This offer was to be good to and including September 20, 1972.

Under date of September 11, 1972, Bowman gave plaintiff a writing repeating the terms of defendant's proposal and adding to exchange his Emergency avenue five buildings upon the terms and conditions stated in defendant's written offer. Bowman agreed, in the event the final was consummated, to pay plaintiff a commission of $2,000. This offer was conditioned upon there being delivered to him a signed contract embodying these conditions "not later than 3 p. m., Thursday, September 14, 1972." On the following day, September 14, Bowman accepted defendant's offer by writing in his letter of September 11 the words, "Accepted 4:17 p. m., September 14, 1972. R. Bowman." Bowman is plaintiff's agent to defendant stating that Bowman had agreed in writing to make the exchange in accordance with the conditions stated in defendant's letter and had accepted the proposition as outlined in defendant's letter of the 11th.

December 16 plaintiff received a letter signed by defendant to the effect that upon investigation of the Sunnyside avenue flat building defendant was of the opinion that it was "not worth the amount represented by you and because of this fact I hereby withdraw my exchange offer of December 14, 1916." Plaintiff thereupon telephoned to defendant and was told by defendant that he was going to New York and on his return would take up the matter again. Subsequently, December 22, Emmerman wrote to defendant referring to the proposed exchange of properties, and notified defendant that he, Emmerman, accepted the offer and had theretofore instructed plaintiff to notify defendant of this acceptance; that he, Emmerman, was ready to deliver title papers and to make the exchange. Defendant declined to carry out the contract and this suit by plaintiff for commissions followed.

This is a case where a broker is employed to secure a contract from the owner of a particular piece of property to sell or exchange it for certain specified considerations. Under such circumstances, the broker is entitled to his commissions from his employer when he secures such a contract. The broker has fulfilled the terms of his employment when he has secured a valid contract from the owner of the property which the employer desires to purchase, agreeing to sell it to the employer upon the terms proposed by him. Fox v. Ryan, 240 Ill., 391; Carter v. Webster, 79 Ill., 435; Scott v. Stuart, 115 Ill. App., 535; Davis v. Fauler, 170 Ill. App. 317; Oliver v. Sattler, 233 Ill., 536.

The defendant waived any question of the ability of Emmerman to perform his part of the contract when he made the written offer to purchase Emmerman's Sunnyside avenue flat building and employed plaintiff to secure Emmerman's acceptance of this offer.

The description of the premises contained in the

Whether is plaintiff received a letter signed by defendant in his effort that upon investigation of the Louisiana system that building defendant was of the opinion that it was "not worth the annual represented by you for because of this fact I hereby withdraw my endorsement after of September 11, 1910."

Plaintiff thereupon informed defendant and was told by defendant that he was going to New York and on his return would talk to the matter again. Subsequently, November 11, defendant wrote to defendant referring to the proposed exchange of properties, and notified defendant that he, Jacobson, accepted the offer and had authorized Lawrence Lazarillo to notify defendant of this acceptance; that he, Jacobson, was ready to deliver title papers and to close the exchange. Defendant declined to carry out the contract and this suit by plaintiff for consideration followed.

This is a case where a person is induced to secure a contract from the owner of a particular piece of property to sell or exchange it for certain specified considerations. Under such circumstances, the broker is entitled to his commissions from his employer when he secures such a contract. The owner has fulfilled the terms of his engagement when he has secured a valid contract from the owner of the property which the employer desires to purchase, expecting to sell it to the employer upon the terms proposed to him. Tom v. Ryan, 140 Ill., 301; Spencer v. Spencer, 97 Ill., 419; Smith v. Stoner, 113 Ill. App., 318; Jones v. Taylor, 177 Ill. App. 317; Oliver v. Bellamy, 173 Ill., 244.

The defendant raises the question of the ability of Jacobson to perform his part of the contract when he made the written offer to purchase Harrison's property which Jacobson's acceptance of this offer.

The description of the premises contained in the

proposition signed by defendant is sufficient. The words are, "The 24-flat building located at 839-45 Sunnyside avenue." This offer was addressed to plaintiff at Chicago and the purchase was to be subject to a described first mortgage. Furthermore, before making the offer defendant inspected the property, interviewing the janitor and tenants. Words of description of land contained in a deed are sufficient if the property can be identified, and this was easy and definite in this case. It is rather far fetched to say that the parties could not determine in what state the property was located.

It is claimed that defendant refused to go through with the deal because he learned that plaintiff was expecting to receive a commission from Emmerman also. He says he first learned this when he received the letter of December 13 from Emmerman, in which Emmerman had agreed to pay plaintiff a commission; that it was explained to him that this was customary in exchanges of real estate in accordance with the rates and rules of the Chicago Real Estate Board. There was no evidence indicating that defendant refused to consummate the exchange because of any question of commissions. In his letter of December 15 to plaintiff defendant states as his reason for withdrawal from the deal that he finds "upon investigation" that the flat building "is not worth the amount represented by you." It has been repeatedly held that where one bases his refusal to carry through a contract on a certain definite reason, he cannot subsequently and upon trial give another reason. He cannot be permitted to amend his hold. Ill. Cent. R. R. Co. v. Seitz, 214 Ill., 350; County of Schuyler v. Missouri Bridge Co., 256 Ill., 348; Gibson v. Brown, 214 Ill., 330; Hibernian Banking Co. v. Zoeller, 181 Ill. App., 581.

In the absence of any evidence showing fraud or misrepresentation on the part of plaintiff with reference to his commissions, it was not error for the court to exclude evidence tending

proposition given by defendant is multifarious. The words are, "the 24-foot building leased to 20-24 Dougalls Lane." This offer was interpreted to identify or describe the premises was to be subject to a described fire hydrant. Furthermore, before making the offer defendant ascertained the structure, dimensions of the premises and tenants. Tests of investigation of land contained in a deed are sufficient if the property can be identified, and this was done by reference to the deed. It is further for evidence to say that the parties would not intended to sell the property was limited.

It is obvious that interpretation without the aid through with the deed because the intention was regarding to receive a description from Bowman Lane. Mr Ross in first instance this when he received the letter of tenancy it from Bowman, to which document had agreed to the identify a mistakenly that it was explained to him that this was consistent to purpose of land estate in accordance with the notes on cause of the things that letter stated. There was no evidence indicating that property referred to commercial and storage premises if the question of conclusions. In his letter of tenancy to be identify underneath stated on the reverse but withdrawn from the land. Mr Ross "used investigations" that the fire building "is not worth the amount represented by you." It has been consistently held that where the deed the property is only referred a contract to a certain definite reason, is found subsequently and upon later give another reason. It cannot be permitted to change his mind.

Cf. Lord, L. J. in v. Jones, 1 Ch. (1.), 390; Jones of Jones v. Kearney Brian Co., 1 Ch. (1.), 389; Gibson v. Kemp, 1 K. (1.), 390; Vibrating Station Co. v. Smith, 1 Ch. (1.), 390, 391.

In the absence of any evidence showing fraud or misrepresentation on the part of plaintiff with reference to the conclusions, it was not error for the court to consider evidence leading

to show that defendant's refusal to proceed was based upon a question of commissions. Where both parties are fully informed and there is no fraud or misrepresentation, we know of no rule which prevents a broker from contracting for a commission from both parties in an exchange of property. Larson v. Shamberg, 148 Ill. App., 80.

By defendant's letter of December 11 he distinctly stated that if plaintiff should sell his property he would pay plaintiff the usual Chicago Real Estate Board commission. Plaintiff secured a valid acceptance of defendant's offer before the defendant attempted to withdraw the same. The only basis for the attempt to withdraw was an alleged misrepresentation of value, and no attempt was made to prove this.

There is no merit in the point that as Grover's interest in the New Jersey property was represented by stock, and as there was no evidence as to commissions on sale of stock there was no basis for the jury to estimate plaintiff's commissions. In the record it was stipulated that the value of the stock which defendant was trading was $23,000, which would be the value of defendant's interest in the land represented by the stock. It was undisputed that plaintiff would be entitled upon the Chicago Real Estate Board rates to 5% of this amount, or $1150. There was no controversy over the amount.

There were no questions of fact for the jury to determine. The papers admitted in evidence make out the complete transaction and the court properly instructed the jury to find for plaintiff, leaving it to the jury to determine the amount of the commissions.

Upon the record we hold that the judgment was proper and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

to show that defendant's contract to provide the tanks was a guarantee of workmanship. These high profits are fully warranted but there is no fraud or misrepresentation, or lack of as into which evidence a basis for contracting for a guarantee from both parties to be aware of insanity. Lyons v. Lockhart, 124 Ill. App., 40.

In Patterson's letter to Jacobson it is clearly stated that if plaintiff should sell his property he would guarantee the tanks through bad Sarah heart operation. Plaintiff showed a total ignorance of Patterson's after tanks the defendant attempts to attribute the same. The only basis for the attempt to substantiate was in original misrepresentation of value, and no attempt was made to prove this.

There is no merit in the point that as Lyons's interest in the tank family already was determined by appeal, and as there was no evidence in a consideration or sale of stock there was no basis for the jury to determine plaintiff's damages. In the result it was established that the value of the stock which defendant was trading was $17,000, which would be the value of Patterson's interest in the land transferred by the stock. It was contended that plaintiff's share in earnings upon the stock before Sarah came to $7 of this amount, or $1500. There was no guarantee over the amount.

There was no question if fact for the jury to determine. The lengthy evidence in relation made out the complete transaction and the court properly instructed the jury in that for plaintiff, leaving it to the jury to determine the amount of the consideration.

Upon the whole we think the judgment was proper and it is affirmed.

AFFIRMED.

Matchett, P. J., and Jonkerd, J., concur.

72 - 28345

(3413a)

METHA ENGLER,
Appellant,

vs.

EDWARD ENGLER,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

232 A. 617

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill for divorce on the ground of cruelty, which upon hearing was dismissed by the chancellor for want of equity. Complainant appeals. After consideration of the evidence we are of the opinion that complainant sufficiently proved the acts of cruelty alleged in her bill and that a divorce should have been decreed. No brief has been filed in this court on behalf of defendant.

The bill alleged general cruelty and specific conduct, once in November and again in December, 1921. Complainant testified that on the first date, in her home, defendant kicked and choked her and struck her in the face. This occurrence was corroborated by Walter Engler, a son of the parties, thirteen years of age, who was present at the time.

Complainant also testified that in December the defendant kicked and choked her and struck her head against the wall. This occurrence is corroborated by a neighbor who saw complainant that day and saw the scratches on her ear and neck. A sister-in-law of complainant testified that on this day she saw a lump on complainant's head and bruises on her head and leg. Dr. Weber testified that he was called to treat complainant after this occurrence and found that she complained about a pain in her neck and side of her head, and that he found contusions on the neck, ear and scalp and a swelling on her head and neck. Complainant informed him that these injuries had

(3Ψ/3a)

ERVIN JOSLIN, Appellant,	
vs.	ORDER FROM MARION COUNTY
ARNALDO MARTIN, Appellee.	of Judgment.

MR. JUSTICE BROWNING DELIVERED THE OPINION OF THE COURT.

Employment filed a bill for divorce on the ground of cruelty, which upon hearing was dismissed by the Chancellor for want of equity. Complainant appeals. After consideration of the evidence we are of the opinion that complainant sufficiently proved the bill of cruelty alleged in her bill and that a divorce should have been decreed. So ruled has been filed in this court an behalf of defendant.

The bill alleges general cruelty and specific instances, once in November and again in December, 1912. Complainant testified that on the first date, at her home, defendant slapped and pushed her and struck her in the face. This corroborated the testimony of Walter Angler, a son of the parties, eleven years of age, who was present at the time.

Complainant also testified that on December 2nd defendant kicked and struck her and struck her head against the wall. This testimony is corroborated by a neighbor who saw complainant that day and saw the marks on her eye and face. A stenographer of defendant testified that on that day she saw a lump on complainant's head and bruises on her head and face. Dr. Weber testified that he was called to attend complainant after this occurrence and found that she complained about a pain in her head and side of her head, and that he found contusions on the scalp, eye and cheek and a swelling on her head and neck. Complainant testified that these injuries had

been inflicted by her husband striking her.

Defendant partially admits these acts, but says that he simply "pushed her away;" that at another time he "set her down on a chair," but that he did not "deliberately" strike her.

Upon the entire record we conclude that the necessary acts of cruelty entitling complainant to divorce were proven.

Complainant also asks that certain real estate, a cottage and household goods, be awarded to her. The house and lot occupied by complainant were bought by both parties for $1650, and the conveyance ran to them as joint tenants. One hundred dollars of this was paid by both parties from their earnings, and $1100 paid by complainant. Apparently the balance represented by mortgage has been paid out of the rents and from the earnings of complainant. Defendant has contributed nothing towards the purchase of the property except part of the original payment of $100. Under such circumstances the complainant should be awarded the sole interest in the entire property, including the household effects.

Complainant is also entitled to proper alimony and solicitor's fees.

The decree is reversed and the cause is remanded with instructions to award the complainant a decree of divorce from defendant, and also to award her the entire interest in the real estate and improvements, together with the household effects, and that she be allowed alimony and solicitor's fees in such amounts as the court may determine, on the record or from other circumstances presented, are proper.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and Johnston, J., concur.

been initiated by her husband children but.

Determined particularly always those cases, but says that is simply "unable but among" that or neither line on "air but does on a chair," but that he did not "difficulty-fully" which her.

Then the notice issued or execution that the necessary data of security multiple commitment to private more private.

Complainant also made that attorney real which, a notice and knowledge grant, in matter to her. The house and its occupied by complainant some rights by her parties for money, and the conveyance had it made as joint tenants. Her husband estate of this was paid by both parties from their earnings, and joint paid by complainant. Apparently the mortgage recommended by mortgage had been paid out of the rents and from the earnings of complainant. Defendant has contributed nothing towards the payment of the property except part of the original payment of $500. Under such circumstances the complainant should be included the rents interest in the entire property, including the homestead effects.

Complainant is also entitled to proper alimony and solicitor's fees.

The master is instructed and the court is requested with instructions to amend the complainant a decree of divorce from defendant, and also to award her the entire interest in the real estate and improvements, together with the homestead effects, and that she be allowed alimony and solicitor's fees in such amounts as the court may determine, on the report of from other circumstances presented, are proper.

ATTORNEYS AND COUNSELLORS AT LAW.

Earnhart, F. T., and Jacobson, J., counsel.

29381
105 - 28381

(34942)

FOREMAN BROS. BANKING CO.,
Trustee Under the Last Will
and Testament of LOUIS NATH,
Deceased,
Appellant,

vs.

BERNSTEIN FURNITURE COMPANY,
a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

232 I.A. 617

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, trustee under the last will and testament of Louis Nath, deceased, brought an action in forcible detainer and upon trial by a jury had an adverse verdict and it appeals from the judgment for defendant.

Plaintiff's case was based upon a written lease expiring July 31, 1922, made by Louis Nath to Abraham Bernstein and shortly after its execution assigned to defendant, which occupied the premises. Upon the trial plaintiff proved its power of trustee to prosecute the suit, introduced the lease and proved a demand for possession on defendant August 9, 1922. Suit was commenced August 16th.

The lease contained an option for an extension for five years upon condition that the lessee, desiring to avail himself of this, should serve a written notice upon the lessor of his election to do so not later than six months prior to the expiration of the term demised by the lease. Defendant asserts that such notice was properly given, which operated to extend the lease for a period of five years after July 31, 1922. The decisive point is whether such notice was given.

Defendant presented a witness, Walter Wade, who testified that he was the general repair man for defendant at its store at the premises in question; that early in November, 1920, which wa

JONIKAS JONAS, ELECTRO CO.,
Trading under the name Still
and Instrument of Social Aid,
Defendant,

Appellant,

vs.

ANASTASIS Christos DOUKAS,
a Hypnotist,
Respondent.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff, trading under the name Still and Instrument of Lodge Aid, brought, through an action in replevin, initiated upon trial by a jury and an adverse verdict and it appeals from the judgment for defendant.

Plaintiff's case was based upon a written lease executed July 23, 1941, made by Louis Aid to Apostos Tsarouhas and shortly after the execution lessee sold to defendant, which accepted the premises. Upon the total allegation proved the point of invasion to prosecute the suit, instituted the lessee and proved a judgment for possession on Saturday August 8, 1942. Suit was commenced August 1942.

The lease contained an option for an extension for five years upon condition that the lessee, desiring to avail himself of this, should serve a written notice upon the lessor of his election to do so not later than six months prior to the expiration of the term demised by the lease. Defendant asserts that such notice was properly given, which operated to extend the lease for a period of five years after July 31, 1942. The decisive point is whether such notice was given.

Defendant presented a witness, Walter Vela, who testified that he was the general agent for defendant in its store at the evidence in question; that early in November, 1942, which we

approximately three weeks before Louis Nath died, and twenty-one months before the lease expired, Nath came into the store and the witness saw Mr. Abraham Bernstein, the president of defendant, take a letter from his pocket and hand it to Mr. Nath, saying "Here is our notice to extend our lease;" that Mr. Nath read the letter and put it in his pocket, saying, "You didn't have to be in a hurry about it," to which Mr. Bernstein replied, "The sooner the better;" that Mr. Charles Bernstein, vice-president of defendant, in charge of the store, was present at this time.

The testimony of Wade is very strongly and sharply attacked in argument. However, we are of the opinion that his story and its truthfulness were properly submitted to the jury, and we would not feel compelled to reverse if the trial were free from prejudicial error.

Both Abraham and Charles Bernstein were permitted, over objections, to testify that they saw Mr. Nath in the early part of November, 1920, in the store of defendant, thus giving important testimony tending to confirm the witness Wade as to the interview with Nath and the service of the notice upon him. These witnesses were officers and stockholders of the defendant company, directly interested in the event of the suit, and were clearly incompetent. Section 2, chapter 51, Illinois Statute (Cahill.) To permit them to testify was reversible error, which has been properly preserved for consideration by the assignments of error.

It was also, under the circumstances, reversible error to admit in evidence a letter dated March 27, 1922, written by plaintiff to defendant making a proposition to re-rent the premises after July 31, 1922, at a substantial increase in rental. This had no bearing upon the sole issue in the case, and was likely to create prejudice in the minds of the jurors against the landlord because of the very considerable increased rental asked for a new term.

Accordingly three weeks before July 4th dawn, and twenty-six months before the issue resolved, just one life the state and the witness was Dr. Theodore Jacobson, the president of Jefferson, take a letter from his pocket and read it to us in, full, saying "Here is my notice to submit my resignation" then he, then put the letter and put it in his pocket, saying, "My time's now to be so a party about it." to which Dr. Jacobson replied, "You answer the matter;" that Dr. Theodore Jacobson, chairman of Jefferson, in charge of the state, was present in this case.

The testimony of this is very strongly and clearly weighed in argument. However, in one of the opinion that the story and the circumstances were properly weighed at the jury, and we would not feel compelled to reverse if the trial were free from prejudicial error.

Both witnesses and Charles Henderson were examined. over objections, to identify that they saw Dr. Jack in the early part of December, 1870, in the state of Jefferson, this giving important testimony tending to confirm the witness Jack as in the interview with Mark and the matter of the notice and has. These witnesses were officers and stockholders of the defendant company, directly interested in the event of the suit, and were clearly incompetent. Section 2, chapter 40, Illinois Revised (Ladd.) 79 provid that no identity was admissible here, which has been properly preserved for determination by the assignment of error.

It has also, under the circumstances, evidently been to admit in evidence a letter dated March 27, 1870, written by Jack to defendant making a proposition to purchase the complaint after July 31, 1870, at a substantial increase in profit. This has no tending upon the sole issue in the case, and the letter is merely prejudice in the minds of the jurors against the defendant because of the very considerable increased profit asked for a new case.

A stenographer employed by defendant testified that November 3, 1920, Abraham Bernstein dictated a letter addressed to Louis Nath; that she typed it and made a carbon copy, giving it with the original to Mr. Bernstein; that she never saw either afterwards until she was shown a carbon copy shortly before the trial. The witness Wade testified that he could not see the contents of the letter alleged to have been given by Abraham Bernstein to Nath, although he saw the top of it, which he undertakes to say bore the heading, "Bernstein Furniture Company," and also saw the signature, "Abraham Bernstein." Defendant called upon plaintiff to produce the original of this alleged letter, but plaintiff's counsel replied that plaintiff never had such a letter in its possession. The stenographer was shown a paper and testified that it was a correct copy of the original letter dictated to her by Abraham Bernstein, which she typed and delivered to him. This paper was then admitted in evidence, over objection. It purports to be a written notice of defendant's election to avail itself of the option to extend the term of the lease.

It was prejudicial error to admit this alleged carbon copy in evidence. No proper foundation was laid. Although the stenographer undertakes to identify the carbon as made by her and given to Abraham Bernstein November 3, 1920, she does not know what he did with the original or the copy. The witness Wade does not and could not undertake to identify the letter which he says Abraham Bernstein delivered to Nath as the letter concerning which the stenographer testified. There is a hiatus between the two occurrences which cannot be bridged by guess work or speculation. Writings introduced in evidence which may be examined by the jury generally have a stronger tendency to produce belief as to the existence of a fact than verbal statements based upon recollection. Reading the letter in question would have a tendency to make the jurors believe that it

a stenographer employed by defendant testified that November 3, 1971, after he demanded in writing a letter authorized by Louis Roth; that she typed it and made a carbon copy, which it with the original to Mr. Bernstein; that she never saw either defendant until she saw them a month very shortly before the trial. The witness then testified that he could not see the contents of the letter alleged to have been given by Carmen Demaria to Jack, although he saw the top of it, which he recognized to be her own handwriting, "Bernstein Securities Company," and also saw the letter, "Abraham Fernandez." Defendant relied upon plaintiff's proof of the alleged letter, but plaintiff's counsel insisted that plaintiff never had such a letter in his possession. The stenographer was shown a letter and testified that it was a carbon copy of the original letter dictated to her by Carmen Demaria, which she typed and delivered to him. This letter was then admitted in evidence, over objection. It purports to be a written notice of defendant's election to "sell stock of the union in return for the loans.

It was stipulated that if called this witness would say in rebuttal. No proper foundation was laid. Although the stenographer undertake to identify the letter, he made no mention of it in Abraham Fernandez's October 3, 1971, who said that when that he did with. He evidence in the case. The witness then denied and could not undertake to identify the letter which he says Carmen Demaria delivered to Jack on the latter conversation which the stenographer testified. There is a direct conflict in the two conversations which cannot be reconciled by some mode or inconsistency. Finding in-testimony in evidence which may be considered by the jury generally, the a stronger tendency to produce belief as to the existence of a fact than verbal statements based upon recollection. Testing the testimony in question would have a tendency to make the jurors believe that it

was the letter which Wade says he saw Bernstein give to Nath, but it is obvious that this can be based at most upon a probability, which is an insufficient ground for the admission of an alleged copy when the existence of an original is denied. Under the peculiar circumstances of this case this alleged carbon copy should not have been admitted.

We should not be understood as holding that if this alleged copy is inadmissible, the defense has therefore failed. No special form of written notice was necessary. The determining fact was whether a written notice of the tenant's election to extend the lease was served upon the landlord and Wade's testimony tended to prove this.

For the errors upon the trial indicated, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

was the lawyer which then were to new Jersey's city in Mark, but it is obvious that this can be based or not upon a probability, which is so insufficient proof for the admission of an alleged copy when the existence of an original is denied. Under the peculiar circumstances of this case this alleged copy should not have been admitted.

It should not be overlooked as further that if this alleged copy is inadmissible, our failure for reversing twice. In special form of written motion was necessary. The interpolation that was written a written motion of the tenant's election to adopt the lease was served upon its landlord and Mark's testimony tended to prove this.

By the error upon the trial Judicial, the judgment is reversed and the cause is remanded.

Reversed.

Dodgers, P. J., and Johnson, J., concur.

(3495a)

114 - 28390

TEOFIL KOWALSKI, Appellee, vs. IGNACZ LENARD, (also known as Ignacy Lenard), Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

232 I.A. 317

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff bringing suit on a breach of warranty of title to a back bar had a verdict and judgment for $500. Defendant has appealed.

Plaintiff bought from the defendant the saloon business and fixtures, including the back bar at 1068 Milwaukee avenue, Chicago, for $10,000, receiving a bill of sale therefor. Plaintiff says that shortly thereafter he learned that defendant did not own the back bar, but that it belonged to Morris Cohn, the owner of the building. Plaintiff with others, investigated the matter and were convinced that Cohn's claim of ownership was valid, and as plaintiff had negotiated a sale of the business to another party including the back bar, he paid Cohn $500 for it. This suit is to recover this amount from the defendant.

Although the testimony is somewhat variant and not altogether clear in some particulars, yet the jury properly could believe that in October, 1920, Morris Cohn took over the business and fixtures of a tenant and became the owner; that subsequently the defendant Lenard, bought the business and fixtures from Cohn but the sale did not include the back bar. The parties evidently treated it as a part of the building. About a year afterwards defendant made the sale to

(3/4/56)

IN - DRAWN

THIRD MUNICIPAL.

CONSIDER.	JUDICIAL FILE
	MUNICIPAL COURT
vs.	OF CHICAGO.
ISRAEL DRAKE, (also known as Ignacy Drake),	
Appellant.	

2831-A. 317

MR. JUSTICE MCCOLLOM DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on a bond of warranty of title to a box car in a replevin and judgment for plaintiff. Defendant has appealed.

Plaintiff bought from the defendant his entire business and fixtures, including the bond, for $4,500 Kilbourn avenue, Chicago, for cleaning, repairing a big of this character. Plaintiff says that shortly thereafter he learned that defendant did not own the truck car, but that it belonged to Sorvis Inc. The owner of the building, Fitzsimmons with others, investigated the matter, and were convinced that Sorvis's claim of ownership was valid, and so plaintiff had negotiations with the business to continue paying in stalling the box car, or pay back rent for it. Then this is to recover that amount from the defendant.

Although the testimony is conflicting and of altogether minor in some particulars, yet the jury evidently could believe that in October, 1956, Sorvis Inc had over the business and fixtures of a bankrupt and assumed the owner that authoritatively the defendant owned, though the business and fixtures from Ohm but the truck car belonged the bank. The partner testimony tended to show a part of the building. About a year of intervening negotiations made the sale to

plaintiff undertaking to convey the back bar. Defendant admits the sale to plaintiff and his warranty; under these circumstances the jury properly found that defendant did not own the back bar, and that having received payment for the same from the plaintiff he should repay him either the value of the back bar or the amount which plaintiff was compelled to pay the owner, Cohn, in order to get title to the same.

It is complained that there is no evidence as to the value of the back bar on which the jury could predicate the amount of damages. There was evidence that it was originally bought from the manufacturing company for $1850, and that it was in good condition at the time plaintiff took possession. In any event the receipt given by Cohn to plaintiff reciting the payment of $500 by plaintiff to Cohn for the back bar was proper evidence supporting the claim for damages because of defendant's breach of his warranty. Whether considered as the reasonable value of the back bar or as the amount necessary to make plaintiff whole, the verdict returned is fair, and will not be disturbed.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

plaintiff undertaking to convey the book her. Defendant could
the only to plaintiff and his servants, under these circum-
stances the jury properly found that plaintiff did not own the
book her, and that having relinquished possession for the same from the
plaintiff he should prove the return of the value of the book her
on the account which generally was impossible to pay the owner.
Cohen, 12 Wash. 4, 40 Pac. 1, 29 Am.

It is contended that even if he is entitled to be the
value of the book her on which the jury could recover the
amount of damages. There was evidence that it was originally
bought from the author, being worth fifty dollars, and that it was
in good condition at the time plaintiff took possession. In any
event the remedy given by law is sufficient without the ex-
ment of plaintiff to take day the book for the jury
evidence contradicting the claim of Lowell, because of defend-
ant's breach of his warranty. Either evidence in the remain-
ddle value of the book her or as the owner consented to make
plaintiff work, the verdict cannot be disturbed, and will not be
disturbed.

For the reasons there indicated the judgment is
affirmed.

Concur.

Rudkin, C. J., and Ellis, J., dissent.

(3496a)

123 - 28399

THOMAS POULOS, Appellee, vs. GEORGE SCOUTELAS, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

2321.A.618

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment rendered by the court, awarding plaintiff $75 in a suit brought for wages.

November 1, 1920, defendant, George Scoutelas, bought from Anastasios Pouleas, an uncle of plaintiff, an undivided one-half interest in a restaurant in Chicago. This partnership continued to January 18, 1921, when Scoutelas bought his partner's interest in the business. Plaintiff worked in the place as a waiter during November and December at $100 a month for which he was paid. He claims to have worked also during January and February, 1921, and received nothing. This suit is for these two months. The court found that he did not work after January 26, and held that Scoutelas was individually liable for the partnership debt owing plaintfff for the time he worked in January and gave judgment for $75.

Partners are jointly liable for the debts and obligations of the partnership, section 15 (b), statute on Partnerships, 106 A (Cahill). It has been repeatedly held that partners are jointly liable for partnership debts and judgment must be against both or neither. (Sherburne v. Hyde, 185 Ill. 580; Sandusky v. Sidwell, 173 Ill. 493; Sinsheimer v. Skinner

Mfg. Co., 165 Ill. 116; O'Donnell v. Turnes, 261 Ill. App. 481.

Anastasios Pouleas was jointly liable with defendant as copartner for the wages due plaintiff while he worked for the partnership and it was error to proceed and enter judgment against one only.

For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

Ex. Co., 240 U.S. 320; Kirkendall v. Dunham, 241 U.S. 490, 491.

Annexation ordinance and joint study with defendant as employer for the sums for electrical utility in number for the purchasing and it is error to permit the [illegible] against and only.

For the reasons stated plaintiff's the judgment is reversed and the cause is remanded.

Reversed and remanded.

Washburn, C. J., and Hamblin, J., concur.

(349 a)

149 - 28425

FRANK MERHAUT,
Appellee,

vs.

MARIE MERHAUT,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

232 I.A. 218

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff bringing suit to recover $1600 had a verdict and judgment for this amount; defendant appeals. One hundred dollars does not seem to be in dispute; the controversy is over the $1500 item.

In July, 1915, the parties were husband and wife. Plaintiff says that his wife wished to make a loan of $4,000 to certain parties named Forembas; that she only had $2,500 of her own money and asked plaintiff to lend her $1500 so that she could make the loan and promised to repay it to plaintiff when the Forembas loan was paid. Plaintiff says he complied with this request and the loan to Forembas was made, falling due in July, 1920; that this was paid on July 21, 1920 by check to defendant, but that she refused to repay him the amount advanced by him. Defendant testified, denying plaintiff's story; she says she never borrowed any money from her husband and never promised to pay him back this $1500.

We gather from the record that at the time the suit was commenced the parties had either been divorced or that a divorce proceeding was pending.

Defendant asserts that as the evidence is evenly balanced, plaintiff has not proven his case by preponderance of the evidence. There was testimony tending to corroborate

MARY MORGAN,

Plaintiff,

vs.

ELLIS MORGAN,

Defendant.

ATTOR. FOR
PLAINTIFF PRO
PRO. PRO PRO.

BRIEF

Mr. Justice Lamberson delivered the opinion of the court.

Plaintiff brought suit in chancery praying for a divorce and judgment for alimony and attorney fees. The defendant failure does not seem to be in issue; the controversy is over the alimony item.

In July, 1937, the parties were married and lived. Plaintiff says that at that time defendant is worth a total of $1,000 to operate jointly owned property. Since she gave him $1,000 of her own money and urges plaintiff to find her share in case she could make the loan and promises to repay it to plaintiff when the interest from the farm. Plaintiff says he complied with her request and the loan to permanent improvements, failing due in July, 1938; that the loan was paid on July 21, 1939 by check in instalments, but that she refused to signature the check by defendant by that. Defendant testified plaintiff's story; she says she never borrowed the money from her brother and never promised to pay the note back to him.

The quality from the trial court that it has the well was considered the testimony that plaintiff been interested in that a divorce proceeding, was evidence.

Defendant answers that as the evidence is equally balanced, plaintiff has not proven his case by preponderance of the evidence. There not sufficient testimony to overwhelmed

plaintiff's story. Anna Porembas testified that when she paid the loan of $4,000 to defendant she inquired about plaintiff getting his share of the loan, and the defendant replied that "he got more money than he loaned me." The jury might reasonably construe this as an admission of the loan from plaintiff to defendant. Furthermore, the jury had the opportunity of seeing the witnesses and determining from their demeanor and manner of testifying as to who should be given greater credence. While the question of fact is rather close, we cannot say that the verdict of the jury was clearly against the weight of the evidence.

The Statute of Limitations is not involved, for it would not commence to run until the money was due, which was in July, 1920, and suit was commenced in January, 1921.

It is suggested that plaintiff was not a competent witness as to any transaction occurring during the marriage, under section 5, chapter 51, Evidence. We are referred to no decisions supporting the suggested construction of this statute. The section makes an exception as to such testimony "in cases where the wife would, if unmarried, be plaintiff or defendant." We see no reason why both parties were not competent witnesses in this case.

In this state husband and wife may contract with each other, except as to compensation for services, and they may sue each other on all contracts except for such services. Thomas v. Mueller, 106 Ill. 36.

We see no sufficient reason to disturb the judgment and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

plaintiff's story. Some witnesses testified that even on paid the loan of $4,000 to defendant, she insisted about nonsexual petting six years of the loan, and the defendant replied that "he got more money than on loans so." The jury might reasonably consider this as an admission of the loan this activity is defendant. Furthermore, the jury had the opportunity of seeing the witnesses and determining from their demeanor and manner of testifying as to who should be given greater credence. Again the question of fact is rather clear, we cannot say that the verdict of the jury was clearly against the weight of the evidence.

The records of bankruptcy is not involved. For it would be necessary to run around the bushes to find, first, we do July, 1970, and not commenced in January, 1971.

It is argued that plaintiff was not a moneylender within the meaning of the Connecticut usury statute, under section 7, chapter 31, statutes. In the instance of a bankruptcy wherein the bankrupt concentration of this is a: the matter makes no difference to the case because the jury where the site would if convicted, the statutes is unclear. We see no reason why such matter may not disposition effective in this case.

In this case which followed and affirmed by defendant is the other, except as to denomination for overcome, but that may be such also on all commercial account for such matters. Cheney v. Murphy, 128 Ill. 34.

We see no multiplier reason to disturb the judgment and it is affirmed.

AFFIRMED.

Matthews, P. J., and Johnson, J., concur.

192 - 28468

H. F. PENNINGTON,
Appellee,

vs.

THE FRANKLIN ASSOCIATION OF CHICAGO,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

23214 18

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for services rendered as an arbitrator, had a verdict against defendant for $1950. We are asked to reverse the judgment thereon.

The defendant is an association of employers engaged in the printing industry. A dispute arose between it and some of its employes who are members of Chicago Typographical Union No. 16. It was finally agreed between the parties to the controversy to leave the matters in dispute to the plaintiff as arbitrator and he agreed to act. It was agreed that each party to the controversy should pay one-half of plaintiff's charges. At the conclusion of his work he rendered a bill for services to each of the parties. Typographical Union paid its share as agreed upon, but defendant refused to pay and this suit followed.

The critical fact in dispute is whether it was understood and agreed by the parties, before the plaintiff commenced his services that his charges were to be $100 per day or $150 per day. Defendant claimed it was the former amount and plaintiff the latter sum.

Plaintiff's story is that when he accepted the employment he stated to the representatives of both parties that his charges "would be at least $100 per day," and not to "exceed" $150 per day, and that this was definitely stated by the representatives of the defendant and all the men representing both parties respectively to the controversy to be acceptable. Plaintiff's version is

P. J. PROCTOR,
Plaintiff,

vs.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY OF CHICAGO,
Defendant.

Action from Municipal Court of Chicago.

Mr. Justice Worthington delivered the opinion of the Court.

Plaintiff, when in fact the services rendered as an architect, had a verbal agreement determined for $1200. He was asked to review the proposed figures.

The difficulty in an association of employers engaged in the building industry. A diverse area between it and some of its employees and the members of various "representative" bodies so. Id. It was finally agreed between the parties in the contracting to leave the matters in dispute to the decision of arbitrators and be agreed to use. It was agreed that each party to the controversy should pay one-half of arbitrator's charges. If the decision of the work be rendered a bill for services to part of the question. Typographical Union said the money or agreed upon, but defendant refused to pay and this suit follows.

The evidence from in dispute is whether it was mutual-ated and agreed by the parties, before the so-called conference his services that his charges were to be $1200 per day or $150 per day. Defendant claimed it was the former amount but plaintiff the latter sum.

Plaintiff's claim is that what he demanded the company-ment be stated to the representatives of both parties that his charges "would be at least $150 per day." He had to "account" $150 per day, and that this was definitely stated by the representatives of the defendant and all his own representations made parties respon-sively to the conferences to be acceptable. Plaintiff's version is

sufficiently corroborated by the other witnesses present, with the exception of one witness, who at the time of the trial was president of the defendant association. Upon the evidence presented the jury was justified in accepting plaintiff's version of the agreement.

Accord and satisfaction is claimed. At a preliminary meeting of arbitrators plaintiff stated to a representative of the Typographical Union and to a representative of the defendant that he usually charged a retainer fee, but as this matter was likely to take some time he would ask for a weekly check from each side on account, and it was agreed that each side should send him a weekly check for $250 on account. Defendant sent him checks for this amount for several weeks. These are not in the usual form of bank checks but are on a printed form described as a "voucher check." They were payable to the plaintiff, endorsed by him and paid through the Chicago Clearing House. On the back, under the printed heading "Statement of Account," are the words in typewriting, "Retainer Fee;" in the column headed "Amount" are the typewritten figures "$250.00;" under the heading "Distribution" are the typewritten words, "Arbitration Expense." Various other words and figures are on the face and back. On a corner of the face of the paper are the printed words, "Make All Endorsements Below. This voucher check is hereby accepted by the payee in full payment of the within account." The acceptance of these voucher checks under the circumstances did not amount to accord and satisfaction. There was no dispute between the plaintiff and defendant at this time with reference to his compensation. A bona fide dispute is an essential factor in accord and satisfaction. Ostrander v. Scott, 161 Ill., 339; Lamp v. Smith, 183 Ill., 179; Bingham v. Browning, 197 Ill., 122.

Furthermore, the payee in the voucher check would not reasonably understand that in endorsing it he was accepting it in

sufficiently corroborated by the other witnesses present, with the exception of one witness, who at the time of the trial was president of the defendant association. Upon the evidence presented the jury was justified in accepting plaintiff's version of the accident.

Damage and malfeasance is claimed. At a preliminary meeting of artificiers plaintiff stated to a representative of the typographical union and to a representative of the defendant that he usually charged a retainer fee, but as this matter was likely to take some time he would ask for a weekly retainer from each side on account, and if was agreed that each side should pay him a weekly check for $25 on account. Defendant met his checks for this account for several weeks. These are not in the usual form of such checks but are marked from depicted as a "Weekly check." They were payable to the plaintiff, endorsed by him and paid through the Chicago Clearing House. On the back, under his endorsement, "Retainer fee;" in the actual bank "account" in the typewritten legend "ACCT.Dr;" under the heading "Distribution" in the typewritten words, "Artificiers Fee." Various other checks and "issues are on the face and back. On a number of the face of the checks are the printed words, "Make all Memorandums Below. This checks clear is hereby accepted by the payee in full payment of the within account." The backsides of these checks where under the distinguishing ink had amount to account and notification. There was no dispute between the plaintiff and defendant in this line with reference to his compensation. A bona fide dispute is an essential factor in account and satisfaction. Pennsylvania v. Sweet, 108 U.S., 558; Lone v. Smith, 154 Ill., 179; Sturges v. Crowell, 167 Ill., 148.

Furthermore, the payee in the voucher check would not reasonably understand that in endorsing it he was satisfying it in

full of all services rendered to date. The words on the voucher check would lead most persons to believe that this was payment only of a "Retainer Fee," as thereon stated. It would require some stretch of imagination to read this voucher check as purporting to be in full compensation for all services.

Reversible error is claimed in the rulings of the court in sustaining objections to the admission of certain letters between the parties. These letters were written after the services were rendered and are merely the statements of the respective claims of the parties. There is nothing in them of controlling importance one way or the other, and while they might have been admitted without error, they could not properly have affected the verdict either way, except possibly they were more favorable towards plaintiff's side; we cannot hold that their exclusion requires a reversal.

The verdict rendered was the only one justified on the record and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

full of all service rendered to date. The risk to the member chosen would lead some persons to believe that the payment only of a "reasonable fee," as herein stated. It would require some sketch of legislation to read into another chosen as performing to be in full consideration for all services.

Incentive appears to consist in the rulings of the board in sustaining objections to the admission of unreasonable fees balanced the position. These letters were written after the services were rendered and are merely the statements of the respective claims of the parties. There is nothing in them of controlling importance one way or the other. Or while they might have been detailed without error, they could not materially have affected the results either way, except possibly they have made favorable impressions relatively slight on members who have been evaluation services a separate.

The verdict handed was the full and satisfied in the record and the judgment is affirmed.

AFFIRMED.

Rothwell, C. J., and Schwartz, J., concur.

201 - 23477

(3412)

A. M. DEMUTH,
Appellee,

vs.

DEMUTH MANUFACTURING CO.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

232 I.A. 613

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment which we assume to be for $412.55, although the abstract fails to show any judgment in the law record.

The suit was brought upon notes signed by defendant, and plaintiff claimed $673.90 due, with interest, from the respective dates of the notes. Subsequently defendant admitted $261.35 to be due, judgment for this amount was entered, and the balance of the claim reserved for further consideration. Subsequently plaintiff had a verdict for the balance of $412.55.

In December, 1920, plaintiff became the president of the defendant corporation at a salary of $40 a week. The by-laws stated that the duties of the president were to preside at meetings, to have general supervision of the corporation, to execute contracts, bonds and agreements as authorized by the Board, and to sign checks, mortgages and contracts requiring a seal. The evidence shows that Frank J. Hinkamp became vice-president and a director of the defendant in June, 1921. Hinkamp's son was a salesman, but failing to make any sales of defendant's products, cooking appliances and steam tables, Hinkamp asked plaintiff to interest himself in making sales, for which the company would be willing to compensate him. Plaintiff says that acting upon this agreement he made certain sales, and thereafter, on May 12, 1922, at a meeting of three

301 - 1927

A. M. BRADY,
Appellee,

vs.

DENVER ASPHALT PAVING CO.,
a Corporation,
Appellant.

APPEAL FROM DISTRICT COURT
OF DENVER.

Mr. JUSTICE WHITEFORD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment which we assume to be for $212.50, although the abstract fails to show any judgment in the law record.

The suit was brought upon notes signed by defendant, and plaintiff claimed $273.40 due, with interest, by the respective dates of the notes. Subsequently defendant admitted $50.50 to be due, payment for this amount was entered, and the balance of the claim remains for further consideration. Independently plaintiff had a verdict for the balance of $212.50.

In August, 1925, plaintiff began the construction of the defendant corporation at a salary of $50 a week. The by-laws stated that the duties of the president were to preside at meetings, to have general supervision of the corporation, to execute contracts, bonds and agreements on authorization by the Board, and to sign checks, notwithstanding not exclusively requiring a seal. The evidence shows that Frank A. Gibson became vice-president and a director of the defendant in June, 1927. Gibson's son was a salesman, but failing to make any sales of defendant's products, taking equipment and always owing, Gibson made very plaintiff in interest himself in making sales, for which the company would be willing to compensate him. Plaintiff says that sales upon this agreement he made certain sales, and thereafter, on July 15, 1927, of a meeting of these

of the four directors of the defendant, the fourth director being in Europe, the matter of compensating plaintiff for these sales was brought up, and a resolution adopted as follows:

> "Voted, That a commission of 5% should be paid A. M. Demuth for the sale of cooking apparatus and steam tables which have been effected by said Demuth."

The notes sued on were then executed by the officers of the defendant for an aggregate amount, which included what was due plaintiff on the weekly salary account and also his commission on the sales referred to in the resolution. There was also a journal entry made on this date referring to the item of $412.55, as 5% "allowed on all personal sales made by A. M. Demuth," and giving the names of the persons to whom sales had been made, and the amounts.

The defense presented is that plaintiff, as president, was not entitled to any compensation for services in the absence of a resolution by the directors prior to the rendering of such services, and that having received a salary for services as president, he could not receive a further sum unless expressly employed for the special service.

The general rule prohibits the payment to an officer of a corporation for extra services, except where a by-law or resolution provides for compensation before the services are rendered. An exception has been made in cases where officers rendered unusual services or services not within the line of their prescribed duties at the request of the corporation or board of directors with the understanding that they are to be paid for; in such cases the law will imply a promise to pay what the services are reasonably worth, and it is not necessary that there be a special agreement to pay, or a precedent resolution providing for compensation. This has been spoken of as the "liberal rule," but now so well established as to be a rule of similar dignity with the general rule. Fletcher Cyc. Corpora-

of the four directors of the enterprise, the French director being in Europe, the matter of commencing financial for these sales was brought up, and a resolution adopted as follows:

"Voted, that a consideration of $1 should be paid to G. Demuth for the sale of existing properties and stock which will have been effected by this date."

The notes and so were then executed by the officers of the defendants for an appropriate amount, which included what was due similarly on the yearly salary account and also the commission on the sales referred to in the resolution. There was also a journal entry made on this date referring to the item of $125.00, as of "allowed on all personal sales made by G. Demuth," and giving the names of the persons to whom sales had been made, and the amounts.

The defendant presented to this plaintiff, in Freiburg, was not entitled to any commission for services in the absence of a resolution by the directors prior to the rendition of such services, and that further received a salary for services as president, he could not receive a further and unless expressly employed for the special service.

The general rule governing the payment to an officer of a corporation for extra services, except where a by-law or resolution provides for compensation before the services are rendered. No promotion has been made to cases where officers rendered numerous services or services not within the line of their prescribed duties at the request of the directorship or board of directors with the understanding that they are to be paid for; in such cases the law will imply a promise to pay when the services are reasonably worth, and it is not necessary that there be a special agreement in any, or a preexisting contract providing for compensation. This has been spoken of as the "liberal rule," but now is well established to be a rule of similar validity with the general rule. Fletcher Cyc. Corpora-

tions, vol. 4, sec. 2739, p. 3985. This liberal rule was applied in Rosehill Cemetery Co. v. Dempster, 223 Ill., 567; Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill., 313; Cheeney v. Lafayette B. & M. Ry. Co., 68 Ill., 570, and reaffirmed in the same case in 87 Ill., 446; also Gridley v. L. B. & M. Ry. Co., 71 Ill., 200; Rockford R. I. & St. L. R. R. Co. v. Sage, 65 Ill. 328.

As plaintiff had a valid and subsisting claim against the defendant at the time of the execution of the notes, such a claim was a sufficient consideration to support the notes. McIntire v. Yates, 104 Ill., 491; McLeish v. Hanson, 157 Ill. App., 605; First Nat'l Bank v. Davis, 156 Ill. App. 462.

Under these circumstances, irregularity, if any, in the calling of the directors' meeting of May 12 is immaterial, as is the question of the right of plaintiff to vote at this meeting.

There was no reversible error in the rulings upon the admission of testimony or in the remarks of counsel for plaintiff upon the trial. For the reason above indicated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

tions, vol. 1, sec. 8[illegible], p. [illegible]. This illegal rule was applied in Peoples Gaslight Co. v. Masterson, [illegible] Ill., 567; Mississippi Mercantile Co. v. Jackson, [illegible] Ill., [illegible]; Chenoweth v. Lafayette K. & N. Co. Co., 88 Ill., 63[illegible], and reaffirmed in the same case in 97 Ill., 446; also Grigsby v. L. N. & N. Ry. Co., 72 Ill., 2[illegible]; Moorhead v. L. & N. R. R. Co. v. Lane, 89 Ill. 328.

As plaintiff had a valid and subsisting claim against the defendant at the time of the execution of the notes, such a claim was a sufficient consideration to support the notes. Delaney v. Yates, 104 Ill., 49; Bolenius v. Benson, 137 Ill. App., 6[illegible]; First Nat'l Bank v. Davis, 150 Ill. App. 4[illegible].

Under these circumstances, irregularity, if any, in the calling of the directors' meeting of May 12 is immaterial, as is the question of the right of plaintiff to vote at this meeting.

There was no reversible error in the rulings upon the admission of testimony or in the remarks of counsel for plaintiff upon the trial. For the reason above indicated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

(3500a)

222 - 28498

JAMES G. MAGNESS, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT
	OF CHICAGO.
LEE WAH, Appellant.	232 I.A. 618

MR. JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an adverse judgment in an action in forcible detainer.

Defendant was in possession of a store at 5238 West Chicago avenue, Chicago, as lessee under a lease from Fannie M. Frink, dated May 1, 1918, for a term commencing that date and ending April 30, 1922. In February, 1922, Fannie Frink made a written lease of the premises to James G. Magness, plaintiff here, for a term of three years commencing May 1, 1922, immediately after the expiration of defendant's lease. Defendant refusing to yield possession at the expiration of his lease, the new lessee brought this suit and had judgment.

Upon the trial no objections were raised by defendant to any of the evidence, there was no cross-examination of witnesses, nor any evidence offered in defense.

No substantial point is made upon this appeal. No notice to quit or demand of possession was necessary, as the term of defendant had expired by the terms of his lease. Section 12, Landlord and Tenant, chapter 80.

The action was clearly one under the Forcible Entry and Detainer Act, where a tenant withholds possession after the termination of the lease by its own terms. Chapter 57, section 2, fourth paragraph.

Defendant was in possession when suit was brought. The evidence shows that he entered into possession when he received his lease; that he was still in possession on February 15, 1922, when Fannie Frink had a conversation with him in the store, and he was also in possession at the time of the trial.

There is no variance between the complaint, proof and judgment. The premises described in the complaint and the leases is the first floor of 5238 West Chicago avenue, in Chicago. The words, "Austin station," in the leases are merely surplusage. There is no merit in any of the points of the defendant, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

Defendant was in possession when such was brought.

The evidence shows that he received his possession when he received his family. That he was still in possession on February 13, 1877, when Tennie Pflank had a conversation with him in the store, and he was also in possession at the time of the trial.

There is no variance between the complaint, proof and judgment. The principal mortgagee in the complaint and the lessee in the first floor of brick work belongs persons, in Chicago. The words, "mortgagee," in the lease are merely surplusage. There is no merit in any of the points of the defendant, and the judgment is affirmed.

AFFIRMED.

Bartlett, J. J., and Scholfield, J., concur.

(3501a)

257 - 28915

P. J. KING, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT OF CHICAGO.
JOHN JURGICK, otherwise known as Jonn Jurisch, Appellant.	

232 I.A. 513

PER CURIAM.

In this case appellee moves for an affirmance of the judgment under Rule 22 of this court for failure of appellant to file a complete record of the case. Appellant filed a short record on the second day of the present term, consisting of the order for the judgment, a copy of the appeal bond and the order approving the same, and asked for an extension of time of 60 days in which to file a complete record, which was granted. The time has expired and no additional record has been filed. There are no assignments of error applicable to the record before us. No further extension of time has been asked for or could be granted. Appellant also asks for statutory damages. The judgment was for $237.50. Under said rule of court the judgment will be affirmed, and, under section 101 of the Practice Act, together with $20 statutory damages for want of prosecution and failure to file an authenticated copy of the record.

AFFIRMED.

287 - 1921

F. J. HIRE, Respondent,	
vs.	
JOHN JENKINS, otherwise known as John Jenkins, Appellant.	

APPEAL FROM
MUNICIPAL COURT
OF ANCONA.

PER CURIAM.

In this case appellee moved for an affirmance of the judgment under rule 12 of this court for failure of appellant to file a complete record of the case. Appellant filed a short record on the second day of the present term, consisting of the order for the judgment, a copy of the appeal bond and the order extending the time, and asks for an extension of time of 60 days in which to file a complete record, which was granted. The time for argument and to submit record has been filed. There are no circumstances of error applicable to the record before us. No further extension of time has been asked for or could be granted. Appellant also asks for statutory damages. The judgment was for $197.00. Under rule 12 of court the judgment will be affirmed, and, under section 183 of the Practice Act, together with 20% statutory damages for want of prosecution and failure to file an authenticated copy of the record.

AFFIRMED.

26992

51 - 26992

(35024)

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JANIE RHODES,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

MR. JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

This writ of error brings in question the judgment of the Criminal Court of Cook County, finding the defendant guilty of receiving stolen property of the value of $14.99, entered upon a trial upon an indictment charging her with having (1) stolen gas, and (2) having received gas of the Peoples Gas Light & Coke Co. knowing it had been stolen.

This case has been heretofore before this court in opinion filed June 26, 1922, 226 Ill. App. 633. We there affirmed the judgment on the ground that the bill of exceptions having been stricken from the record there was no error in the common law record requiring reversal. The case proceeded to the Supreme Court, 308 Ill. 146, where it was held that the bill of exceptions was erroneously stricken from the record and the judgment was reversed and remanded to this court with directions to consider and determine the errors assigned based upon the bill of exceptions. The facts are stated in these two opinions, and we shall not repeat them.

In its opinion the Supreme Court said that "if it was shown that the offense was committed more than eighteen months before the return of the indictment and that the value of the gas was $15 or less, plaintiff in error was entitled to have the jury instructed that they should return a verdict

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

JOHNSON COUNTY.

COOK COUNTY.

Plaintiff in Error.

MR. JUSTICE SCHAEFER delivered the opinion of the court.

This writ of error brings in question the judgment of the criminal court of Cook County, sitting as a tribunal of summary criminal contempt, imposing a fine of $25.00, based upon a notice upon an information charging her with having (1) worn gum, and (2) having a chewing gum on her tongue the night a jury was in. Knowing it has been trying.

This case has been heretofore taken to this court in opinion filed June 20, 1952, 412 Ill. 404, 406. In that opinion the judgment on the ground that the trial of charges having been conducted from the general charge to be tried in the general jury room, and 111. 2d, 111. 404, 406. In that opinion the judgment was reversed and remanded to this court with directions to consider and determine the errors assigned upon the bill of exceptions. The facts are stated in the opinion and, as we shall see, appear to be undisputed.

In the opinion the majority said that "if it was shown that the officer was consulted with the jurors before the return of the indictment and that the value of the gum was $25 or less, plaintiff in error was entitled to have the jury instructed that they should return a verdict

of not guilty if they found these facts from the evidence." Referring to the record we find that the indictment was returned June 8, 1920. From the evidence in the bill of exceptions it appears that the gas was used on the premises involved in August, 1918, or nearly twenty-two months before the indictment was returned. The value of the gas used was found to be less than fifteen dollars. The offense was therefore a misdemeanor, and the statutory limit of eighteen months having expired, the jury should have returned a verdict of not guilty.

Defendant was charged with theft in the first count, and in the second count with having received stolen property. The verdict found her guilty on the second count only. There is no evidence whatever to sustain this count. At best, there is evidence that gas was burned upon the premises after the gas company had removed its meter and disconnected its pipes. If defendant used this gas it might possibly be considered a theft, but by no reasoning can it be said that in so doing she was receiving stolen property as the crime is defined in the statute.

For the reasons above indicated the judgment of the Criminal Court is reversed. As there can be no conviction under the indictment the case will not be remanded.

REVERSED.

Matchett, P. J., and Johnston, J., concur.

of her guilty if they found their fears, from the evidence."

Referring to the record we find that the indictment was returned June 6, 1921. From the evidence in the bill of exceptions it appears that the gas was used on the premises involved in August, 1920, or nearly another two months before the indictment was returned. The value of the gas used was found to be less than fifteen dollars. The offense was therefore a misdemeanor, and the statutory limit of eighteen months has barred prosecution. The Jury should have rendered a verdict of not guilty.

Defendant was charged with theft in the first count, and in the second count with having received stolen property. The evidence fixes her guilty on the second count only. There is no evidence whatever to sustain this count. It tends, there is evidence that gas was burned when the premises after the gas company had removing its meter and disconnected its mains. If defendant used this gas it might probably be considered a theft, but by no construction can it be said that it is so that she was receiving stolen property as the crime is defined in the statute.

For the reasons above indicated the judgment of the Criminal Court is reversed. No there can be no prosecution under the indictment the case cannot be remanded.

REVERSED.

McCLAIN, C. J., and DENNISON, J., concur.

158 - 28434

(3503)

LOEB & SCHOENFELD COMPANY,
a corporation,
Appellee,

vs.

S. I. FRIEDMAN, doing business
as Lyons Manufacturing Company
of Chicago,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

2321.A.019

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $5,432.26, against defendant entered upon a verdict returned in the trial of a suit brought to recover the price of merchandise sold and delivered.

Defendant is a manufacturer in Chicago of women's garments and had, at times, purchased embroidery from plaintiff, a manufacturer in New York. This suit involves a lot billed under date of November 15, 1920, and two other lots billed under date of January 7, 1921. The receipt of these is admitted and no part was returned. Part of the merchandise was used by defendant in his business, the balance stored in a warehouse, and the storage charges paid by him. He kept the warehouse receipts and shortly before the trial moved a portion of the goods from the warehouse to his factory. No payment was ever made for any portion of these goods.

Defendant argues, although somewhat obscurely, that the first lot shipped was not ordered by defendant, and that the other lots were inferior to samples. We cannot examine the evidence on these points for the reason that no motion for a new trial has been preserved in the bill of exceptions. It is the settled rule that, in the absence

LEON S. [illegible],
a corporation,

Appellee,

vs.

E. I. [illegible], doing business
as Lyons Manufacturing Company
of Delaware,

Appellant.

APPEAL FROM
[illegible]
CIRCUIT COURT
OF [illegible].

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $2,[illegible],[illegible], against defendant entered upon a verdict returned in the trial of a suit brought to recover the price of merchandise sold and delivered.

Defendant is a manufacturer in Chicago of [illegible] garments and hat, at times, particularly [illegible] Christmas tiff, a manufacturer in New York. This suit involves a bill billed under date of November 1[illegible], 19[illegible], and two other bills billed under date of January 7, 19[illegible]. The receipt of these is admitted and no goods were returned. Part of the merchandise was used by defendant in its business, the balance stored in a warehouse, and the shortage charged back by him. In light the evidence relative and identify before the trial court a portion of the goods from the warehouse to his factory. No payment was ever made for the portion of these goods.

Defendant urges, although [illegible] objections, that the claim for [illegible] was barred by [illegible], and that the other bill was fraudulent on [illegible]. We cannot examine the evidence on these points for the reason that no motion for a new trial has been presented to us with [illegible] exceptions. It is the settled rule that, in the absence

of the motion for new trial thus preserved, no question can arise in a court of review on the sufficiency of the evidence to support the verdict. Greenwell v. Hess, 298 Ill. 459; Anderson v. Karatens, 297 Ill. 76.

The instructions given by the court are criticized but we find no reversible error in this respect. Even if the instructions were improper, they could not be questioned now as all the instructions which defendant requested were given and no objections to any of them were made at the trial. Malecki v. Heldman, 199 Ill. App. 484; Pennsylvania Co. v. The Durham T. & W. Co., 185 Ill. App. 110.

The Statute of Frauds has no application where the buyer accepts part of the goods sold and actually receives the same. Chapter 121 a, (Cahill) section 7, Sales. Defendant here received and kept the goods.

The complaints made of the rulings of the trial court upon the evidence are wholly without merit.

The jury was instructed that they might give plaintiff interest if it found there had been vexatious delay in paying the indebtedness, and interest was included in the verdict. The invoices specified definitely when payments were due and interest was figured from these respective dates. We see no reason why a buyer who delays payment beyond the time specified when it becomes due should not thereafter pay interest on the amount. To do otherwise would burden the seller with the expense of carrying the account indefinitely at the whim or convenience of the buyer. The allowance of interest under such circumstances has been frequently approved. Braun v. Hess, 187 Ill. 383; Laughlin v. Hopkinson, 292 Ill. 80.

Plaintiff asks that statutory damages be allowed on

of the action for our trial judge [illegible], so question can arise in a court of review on the application of the evidence to support the verdict. Pennsylvania v. Lane, 340 U.S. 593; Anderson v. Jackson, 307 U.S. 85.

The instructions given by the trial judge are criticized but we find no reversible error in this respect. Even if the instructions were improper, they would not be sufficient ground for a reversal unless such erroneous instructions were given and an objection to any of them was made by the trial. Fleming v. Bowman, 170 U.S. 643; Chicago, Indianapolis Co. v. The Judge, 6 [illegible], 106 U.S. 642, 652.

The finding of fraud has no application where the buyer assumes part of the grain and actually receives the same. Thorpe 210 v. Fidelity Mutual 7, Ohio. [illegible] have arrived and kept the grain.

The complaint also of the pleadings of the trial court upon the pleadings are clearly without merit.

The jury was instructed that they might give damages if it found there was no [illegible] in paying the indebtedness, and evidence was introduced to the contrary. The instructions specifically [illegible] which were not interest was figured from their [illegible]. It was at trouble for a bond the [illegible] [illegible] the time [illegible] when it became due which was [illegible] [illegible] at the moment. To be otherwise would [illegible] the [illegible] of carrying the account [illegible] in the [illegible] of the buyer. The [illegible] of interest [illegible] have been [illegible]. Brown v. Lane, 140 U.S. 154; Lowrie v. [illegible], 90 U.S.

Finally [illegible] damages be allowed on

the grounds that this appeal has been for delay. Such damages are permitted for a sum not exceeding 10 per cent of the amount of the judgment, in the discretion of the court. Section 23, chapter 33 (Cahill).

Consideration of the record and all the points presented to us impel us to the opinion that there is no substantial reason for taking this appeal and that it was solely for delay. We shall therefore affirm the judgment and enter in this court an additional judgment against the defendant for $250 damages.

AFFIRMED WITH DAMAGES OF $250.

Matchett, P. J., and Johnston, J., concur.

the grounds that 'all agents are bound for duty.' Such dangers are peculiar for a man not exercising his own part of the manner of the judgment. In the discussion of the moral, Hastings M. chapter 12 (xxiii).

Constituents of the primary and all the points presented to us based on to the analysis that there is no substantial reason for believing that which is not solely for duty. A full discussion after the judgment and under in this order in additional judgment explains the relationship for good conscience.

Difficult with analysis of such.

Butler's, T. L., and Hutcheson, J., essays.

(3504a)

231 - 28507 28507

CITY STATE BANK OF CHICAGO,
a corporation,
Appellee,

vs.

HARDINGE BROTHERS, Inc., and
FRANKLIN HARDINGE,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

232 I.A. 219

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $11,913.75, upon a directed verdict in the trial of a suit on a promissory note for $10,000, made by the defendant Hardinge Bros. Inc., and endorsed by defendant Franklin Hardinge, payable to the order of the Liquid Power and Heating Company, and alleged to be sold and delivered before maturity to the plaintiff for a valuable consideration.

Was plaintiff an innocent purchaser for value before the note was due? It is dated June 18, 1921, and is due on or before six months after date. Plaintiff is engaged in the general banking business in Chicago. Albert Moss, an officer and director of the bank testified that it was purchased by the bank July 28, 1921; that a few days before this it was offered to the bank for discount by a Mr. Bell, the president of the Liquid Fuel Power and Heating Co., the payee; he told Mr. Bell that if the Liquid Fuel Company would open an account with the bank they would consider discounting it; that he got a favorable report from Dunn's Agency on Hardinge Bros.; that he attempted to communicate with them and Franklin Hardinge over the telephone but without success; that he inquired of Hardinge Brothers' clerk as to where they did their banking business and thereafter

(35074)

[illegible]

[illegible] a corporation,

[illegible]

vs.

[illegible] INC., and [illegible] CORPORATION,

[illegible]

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an appeal from a judgment for $22,[illegible], upon a directed verdict in the trial of a suit on a promissory note for $10,000, made by the defendant Corporation, Inc., and endorsed by defendant Franklin [illegible], jointly to the order of the plaintiff and further guaranty, and alleged to be sold and delivered before maturity to the plaintiff for a valuable consideration.

The plaintiff in [illegible] produced the note sued upon. It is dated June 1[illegible], 1[illegible], and is due in [illegible] six months after date. Plaintiff's evidence is the general testimony [illegible] Chicago. Lewis Ross, an officer and director of the [illegible] that it was purchased by [illegible] July 30, 1[illegible]; that a few days before this it was offered to the bank for discount by a Mr. [illegible], the president of the Liquid Fuel Power and Chemical Co., [illegible] Mr. [illegible] that if the Liquid Fuel Company would come in [illegible] with the bank they would probably discount it; that he got a favorable report from Dun's agency on Liquid Fuel; that he attempted to communicate with Ross and Franklin Hartigan over the telephone but without success; that the invoice of Liquid Fuel's claim is to some shop [illegible] welders and [illegible]

called up the presidents of these banks and having become convinced that Hardinge Bros. were responsible, he then notified Mr. Bell that the bank would discount the note, which was done; an account was opened with the Liquid Fuel Co. which was credited with $10,000, the face of the note. On the same day, July 28th, he wrote a letter to Hardinge Bros. advising them that the bank had purchased the note and wished advice as to whether it was a proper obligation and a genuine note. July 30, Mr. Franklin Hardinge had an interview with Mr. Boos. Hardinge testifies that he told Mr. Boos that he "denied the obligation" and "we are not going to pay it." That he wished to show Boos a contract relating to the note but that Boos said he did not care to see it; that he only wanted to know as to the genuineness of the signatures.

It is sought to prove knowledge on the part of the plaintiff bank of the transactions leading up to the execution of the note through the knowledge and relation to the transaction of Walter Nekert, an attorney for the Liquid Fuel Co. Mr. Boos had been introduced to Bell by Nekert before the note was purchased. Defendants earnestly argue that the evidence shows that Nekert, at the time the note was discounted, was also the attorney for the plaintiff bank and that his knowledge would be knowledge to the bank. This argument is based upon a misapprehension of the record. It is evident that when Boos referred to Nekert as the attorney "for the bank," he does not mean the plaintiff but another bank with which Boos had been connected before he became connected with the plaintiff bank. Mr. Boos testifies categorically that Nekert was not, at the date of the discount of the note, an attorney for the plaintiff bank and not then or at any other time employed as its attorney. Mr. Nekert himself was placed upon the stand by the defendants who could readily have ascertained from him as to his relations to, or connections with the plaintiff bank.

called up the president of Alamo Banks and having heard conversation between Hutchings Sons, were responsible, in some notified ur. Bell that the bank would discount the note, and it was done; an account was opened in the Liberal Bank in, which was credited with $10,000, the face of the note. On the same day, July 28th, he wrote a letter to Hutchings Sons, advising them that the bank had purchased the note and asking of to whether it was a proper obligation and a genuine note. July 30, Mr. Hutchings Sons replied and an interview with Mr. Doe. Hutchings Sons stated he told Mr. Doe that he "signed the obligation" and "we are not going to pay it." Then he claimed to show from a confidential letter to the note that Doe said he did not owe it; that he only signed to make - in the phraseology of the transaction.

It is sought to prove misdeeds on the part of the plaintiff bank of the transactions leading up to the execution of the note through the exchange and collusion in the transaction of Kelly Sawyer, an attorney for the plaintiff co. Mr. Doe had been induced to sell by Robert Sellers the note sue upon claimed. Defendants contentfully argue that the evidence shows that Sawyer, at the time the note was discounted, was also the attorney for the plaintiff bank and that his knowledge would be knowledge to the bank. This argument is based upon a misconception of the record. It is evident that when Doe authorized to return to the attorney "for the bank," he does not mean the plaintiff bank; another bank with which Doe had been connected before in dealing relationship with the plaintiff bank. Mr. Doe testifies unequivocally that Sawyer was not, at the date of the discount of the note, an attorney for the plaintiff bank and was then or at any other time employed as its attorney. Mr. Sawyer himself was placed upon the stand by the defendants who could readily have ascertained from him as to his relations to, or connections with the plaintiff bank.

But no inquiry was made of him touching this. It therefore stands uncontradicted upon the record that Eckert was not an agent of, or connected in any representative way with the plaintiff bank at the time the note was discounted. It follows therefore that whatever knowledge he may have had could not be imputed to the plaintiff.

The record is not only clear that plaintiff took the note on July 28, without any knowledge of alleged defenses but that on July 30, at the interview with Franklin Hardinge, the bank received no information or knowledge of any facts constituing a legal defense to the note. Hardinge simply denied generally an obligation and willingness to pay.

A holder in due course is one who takes a negotiable instrument which is complete and regular upon its face before it is due in good faith and for value without any notice of any infirmity in the instrument or defect in the title of the person negotiating it. Section 93, Negotiable Instruments, chapter 98, Illinois Statute (Cahill). It is now the rule that mere suspicion or knowledge of circumstances calculated to arouse suspicion in the mind of a prudent man or even gross negligence on his part at the time of the transfer will not defeat his title. The only thing that will defeat this is bad faith on his part and the person asserting this must establish that fact by a preponderance of evidence. Bradwell v. Ryan, 221 Ill. 602. A person taking a note must have actual knowledge of an infirmity or knowledge of such facts that his action in taking the instrument amounts to bad faith. Chicago Auto Sales Co. v. H. J. Peters Co., 221 Ill. App. 363. Only bad faith will defeat one who takes a commercial note payable before maturity for value and without knowledge of any defense thereto. Kavanaugh v. Bank of America, 229 Ill. 434.

But no inquiry was made of the tenants this. It therefore cannot unconditional upon the ground that notice was not in agency of, or received in the administration by the plaintiff bank of the case the bank was negligent. It follows therefore that whatever knowledge he may have had could not be imputed to the plaintiff.

The record in no way shows that plaintiff took the note on July 20, without any knowledge of illegal endorsement that on July 20, at the interview with Franklin Bertram, the bank received no information or knowledge of any facts constituting a legal defense to the note. Plaintiff acted in good faith and without negligence in so.

A holder in due course is one who takes a negotiable instrument which is complete and regular upon its face before it is due in good faith and for value without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Section 73, Negotiable Instruments, Chapter 54, Illinois Revised Statutes. It is not the rule that any mere suspicion or knowledge of circumstances calculated to cause alarm is the kind of a prudent man, or even gross negligence on his part at the time of the transfer will be deemed bad faith. The only thing that will defeat this is bad faith on the part of the purchaser and knowing this most strongly that fact by a preponderance of evidence. Tuttle v. Jones, 68 Ill. 499. A person taking a note must have actual knowledge of a defense or knowledge of such facts that are sufficient to lead a man of ordinary prudence and discretion to conclude that a defense was false. Pierce Oil Corp. v. R.C.A. Photo Corp., 351 Ill. App. 320. Only bad faith will defeat an one taking a negotiable note payable to order without any notice of a defense or knowledge of any infirmity therein. Lawrence v. Bank of America, 319 Ill. App.

Applying this test to the facts before us, we are of the opinion that no bad faith has been shown on the part of the plaintiff in purchasing the note in question and that it is an innocent purchaser in due course as defined by the statute.

Plaintiff made a prima facie case that it was an innocent holder for value and the defensenproducing no evidence to disprove this, the court properly directed a verdict for the plaintiff.

A great deal of testimony has been taken and argued extensively touching the transaction between the Liquid Fuel Co., and the defendants which led up to the execution of the note. In view of our opinion as above expressed, it is unnecessary to comment upon this. However, we have examined the same and while in certain particulars there might be questions of fact which should be submitted to a jury, it appears to be sufficiently proven that the note was made not as claimed by the defendants because of representations concerning orders for certain oil burners falsely claimed to have been secured by the Fuel Co., but was executed in consideration of the cancellation by the Fuel Co. of a license contract dated March 25, 1921, and the execution of a new contract dated June 18, 1921, which is the date of the note. So that if it had been shown that the plaintiff bank had full knowledge at the time it took it, of all the matters leading to the execution of the note, there would have been nothing to apprise plaintiff that the note did not constitute a valid and binding obligation upon the defendants.

It does not avail defendants that the bank did not pay cash for the note but opened an account with the Liquid Fuel Co. giving it credit for the proceeds. The record shows that nearly $7,000 had been paid out from this credit amount

applying this test to the facts before us, we are of the opinion that no bad faith has been shown on the part of the defendant in proceeding the note in question and that it is an innocent purchaser in due course as defined by the statute.

Plaintiff made a prima facie case that it was an innocent maker for value and the defendant, relying on evidence to disprove this, the court properly directed a verdict for the plaintiff.

A great deal of testimony has been taken and argued extensively concerning the transaction between the Lloyd Tool Co., and the defendants which led up to the execution of the note. In view of our opinion as above expressed, it is unnecessary to comment upon this. However, we have examined the case and find in certain particulars there might be questions of fact which should be submitted to a jury. It appears to be undisputed by persons that the note was made out as claimed by the defendants because of representations concerning orders for certain oil burners falsely claimed to have been secured by the Tool Co., but was accepted in consideration of the cancellation of the Tool Co. of a license contract dated March 31, 1931, and the extension of a new contract dated June 16, 1932, which is the date of the note. So that if it had been shown that the plaintiff bank had full knowledge at the time it took it, or all the matters leading to the execution of the note, there would have been nothing to support plaintiff that the note did not constitute a valid and binding obligation upon the defendants.

It does not avail defendants that the bank did not pay cash for the note but opened an account with the Liquid Fuel Co. giving it credit for the proceeds. The record shows that nearly $7,000 had been paid out from this credit account

before July 30, when Franklin Hardings had his interview with Mr. Boos; that no other disclaimer of liability was given to plaintiff until the affidavit of defense was filed in the suit, at which time, the entire amount had been withdrawn from the bank.

It has been held it cannot be claimed that a bank is not an innocent purchaser of a note without proving not only that it took the note upon a discount crediting the payee with the amount as a deposit but also what the state of the account was between the bank and the payee at the time of the discount and that the amount due on the deposit, if any, had not been drawn out prior to the trial, or the filing of pleas giving notice of the defenses. Herman v. First Nat. Bank, 185 Ill. 60.

Other points have been presented for consideration but for the reason first above stated, we hold that the directed verdict for the plaintiff was proper, and the judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

Between July 20, when Franklin Roosevelt was the Democratic nominee, and August 3, when he arrived at Chicago, the Democratic National Committee had been withdrawn from the bank.

It was a bank held it without be claimed that a bank is not an independent organization of a party without placing not only that it took the money from a Democrat committee, the money with the account as a deposit but also that the money of the account was between the bank and the money of the Democrat and that the account was an organization, if any, had not been transferred prior to the trial, or the filing of a dividing notice of the defendant. Lopez v. Pierce, 1 Cal. App. 108 111 (2).

Other points have been presented on demurrer, but for the reason first above stated, we hold that the directors vested for the plaintiff was proper, and the judgment is affirmed.

WOOLWINE.

Waldron, P. J., and Finlayson, J., concur.

(35050)

28534

258 - 28534

COLUMBIA PHONOGRAPH CABINET COMPANY, a corporation,
Appellee,

vs.

ENTERPRISE SALES COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

232 I.A. 320

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it for $547.47, in a suit in which plaintiff claimed this amount due for goods sold and delivered, and for moneys advanced. Defendant filed an affidavit of merits and also a plea of set-off, claiming that plaintiff owed it a balance for commissions of $1,654.48. On trial by the court, the finding was against defendant's set-off and for the amount claimed by plaintiff, and judgment was entered accordingly.

The crucial question is whether defendant purchased the goods described in plaintiff's statement of claim, or whether it was a broker and selling agent in these transactions. The trial court held that these were sales to defendant by virtue of a contract between them. We are of the opinion this was error and that the contract and relations of the parties show that defendant was not a purchaser but a sales agent for plaintiff on commission.

Darrel Hallenstein, president of the defendant company testified that this company was a manufacturers' representative on commission, in the furniture and phonograph line; that it does not buy goods outright or do jobbing, and does not bill purchasers. July, 1920, Hallenstein procured

[illegible]

[illegible]

[illegible]

an order from John S. Noel, of Grand Rapids, Michigan, for 100 phonographs, which he delivered to Mr. Nordlund, president of the plaintiff, together with a report on Noel as to his financial responsibility. Nordlund stated that this rating was satisfactory and that the plaintiff would ship the goods to Noel. At the same time, under date of August 25, 1920, a written contract was made between the parties in the form of a letter which was accepted by the defendant, the salient parts of which are as follows:

> "We quote prices on the following models of phonographs to you equipppd with Johnson Electric Motor and finished stated. On signed orders of 100 machines or more we will furnish special names and grills without extra cost providing they are not too elaborate.
>
> We further agree to invoice goods as per your prices and remit to you by check the difference between our price quoted customer by you. The following prices are F.O.B. Chicago:
>
> * * * *
>
> Above prices to hold good until March 1st, 1921. Above applies to orders taken and pending at Grand Rapids, Mich., by D. D. Hallenstein."

Plaintiff never charged or billed defendant for the phonographs sold to Noel but carried the account on its books against Noel. There was correspondence between Noel and the plaintiff with reference to these machines, plaintiff writing to Noel asking for a check to apply on account and saying that any questions as to the condition of the machines would be adjusted. Plaintiff in its manner of handling the Noel orders treated with him directly as the purchaser demanding payment from him and never at any time charged defendant with these goods.

This is typical of all the other sales. There was no charge account on the plaintiff's books against the defendant for goods sold, but the accounts were opened in the name of the purchaser as orders from the defendant were sent in. The goods were shipped directly and invoiced to the purchaser a copy of

an order from John G. Ross, of Grand Rapids, Michigan, for 120 phonographs, which he delivered to Mr. Barnhart, president of the plaintiff, together with a report on deal or to his financial responsibility. Barnhart stated that he had written and telegraphed and that the plaintiff would ship the goods to Ross. At the time, under date of August 21, 1908, a written contract was made between the parties in the form of a letter which was accepted by the defendant, the salient parts of which are as follows:

> "We agree to ship you the following models of phonographs to you equipped with Jackson diaphragm motor and finished stands. On alpha orders of 120 machines we agree to fill triangle operatic horns and grills without extra cost providing they are not the elaborate.
>
> We further agree to develop grade on our part prices and credit to you to enable you to difference between our prices various customers in view. The following prices are f.o.b. Chicago:
>
> * * *
>
> Above prices to hold good until March 1st, 1909. Above applies to orders taken and shipped at Grand Rapids, Mich., by G. G. Blackenstein."

Plaintiff never charged or billed defendant for the phonographs said to have been delivered the amount on its books against Ross. There was correspondence between Ross and the plaintiff also referring to these machines, plaintiff writing to Ross asking for a check to apply on account and stating that any questions as to the condition of the machines could be adjusted. Plaintiff in the manner of handling the Ross orders treated with him directly as the purchaser remaining personally free and never as for that thought defendant with those goods.

This is typical of all the other orders. There was no change except on the plaintiff's books against the defendant for goods sold, but the shipments were opened in the name of the purchaser as ordered from the defendant were sent in. The goods were shipped directly and invoiced to the purchaser a copy of

the invoice being sent to defendant. Plaintiff's statement of claim shows certain credits of commissions to defendant, although there is dispute as to the correctness of the amounts.

Whether or not one is a purchaser or a sales agent is not determined by the name which the parties have seen fif to apply to their contract but by its true nature and effect. The essence of a sale is the transfer of the title to the goods for a price paid or to be paid, so that the transferee who obtains the goods is selling the goods as his own. The essence of agency is the sale of goods, not as his own property but as the property of the principal who is entitled to demand and receive the proceeds of the same when sold, less the agent's commission. In doubtful cases, the courts will incline against the parties whose ambiguous language has caused any uncertainty in the contract. Mechem on Agency, Vol. 1, p. 50.

Even if we were confined to the language of the contract of August 25, it would be more reasonable to construe it as an agency contract than as a contract of purchase and sale. The language refers to "signed orders," to be procured by defendant; goods to be invoiced to the purchaser as per defendant's prices and plaintiff agreed to remit the difference between the price named in this letter and the price quoted to the customers by defendant. These prices were to apply "to orders taken and pending" at Grand Rapids. This language clearly denotes an agency. This is made more certain by the manner in which the parties construed and carried out this contract. Their relations with reference to the transactions in question were not those of a vendor and vendee but of principal and agent.

Defendant asks this court to enter a judgment for it upon its claim of set-off. The trial court passed only on the construction of the contract, and we think erroneously. Under

the invoice being sent to defendant. Plaintiff's statement of claim shows overdrawn credits of considerable to defendant, although there is doubt as to the correctness of the amounts.

The court or not one is a merchant or a wholesaler is not determined by the mere fact the parties have been led to supply to their customers but by the true nature and effect. The essence of a sale is the transfer of the title to the goods for a price paid or to be paid, so that the transferee can obtain the goods is fulfilling the goods in his own. The essence of agency is the sale of goods, but merely the property but as the property of the principal and is entitled to account and receive the proceeds of the sale when sold, less the agent's commission. In doubtful cases, the courts will hold against the parties where relations have been created by agreement in the contract. Bodkin on agency, Vol. 1, p. 18.

Even if we were confined to the language of the contract of agent ch, it would be near impossible to construe it as an agency contract when as a contract of purchase and sale. The language refers to "agent accounts" to be produced by defendants goods to be invoiced to the purchaser on his requisitions prices and plaintiff agreed to credit the difference between the price fixed in this letter and the price quoted to the customers by defendant. These prices were to equip "no secret terms and profiting" at first hands. This language clearly denotes an agency. This is more evident by the manner in which the parties conducted and carried out their contract. Their relations with reference to the transactions in question were not those of a vendor and vendee but of principal and agent.

Defendants case also cannot be under a judgment for it upon its claim of set-off. The trial court ruled only on the construction of the conditions, and on this ground only.

these circumstances we do not feel justified in entering judgment for defendant on its claim of set-off. There must be another trial in which the respective rights of the parties should be determined upon the basis of principal and agent in the transactions in evidence. The amount of commissions, if any, owing to defendant, should be definitely determined and a judgment entered accordingly.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

26 - 27831

(35060)

DR. D. H. CUNNINGHAM,

Plaintiff in Error,

v.

THE NOKOL COMPANY OF ILLINOIS,
a corporation,

Defendant in Error.

ERROR TO

COUNTY COURT

COOK COUNTY.

232 I.A. 20

Opinion filed Dec. 26, 1923.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This writ of error is prosecuted from a judgment in the sum of $1,000.00 which was entered on January 6, 1922, in the December term, 1921, of the County Court of Cook County, in a suit brought by the plaintiff, The Nokol Company, for the price of certain merchandise alleged to have been sold by the plaintiff to Dr. D. H. Cunningham, the defendant. Summons was issued and served and a declaration filed containing the common counts, to which latter, on June 11, 1921, the defendant filed a plea of the general issue and a plea of set off. Thereafter on January 6, 1922, a similiter was filed to the plea of the general issue and a replication to the plea of set off, which replication concluded to the country.

On March 25, 1922, there was filed in this court a transcript which recites that it is " a complete Transcript of the Record" and that transcript shows under date of January 6, 1922, the following:

"This day came before me the Honorable Frank S. Righeimer sole Presiding Judge of the said Court, the said THE NOKOL COMPANY plaintiff, by his Attorney, and thereupon it appearing to the

No. 1720.

Mr. R. R. Jackson,

Plaintiff in Error,

v.

The Good Society of Elkton,
a corporation,

Defendant in Error.

Opinion filed Dec. 20, 1926.

Mr. Justice Jones delivered the opinion of the court.

This suit of error is prosecuted from a judgment in the sum of $1,000.00 which was entered on January 8, 1921, in the Lawrence Law, 1001, of the County Court of Lake County, in a suit brought by the plaintiff, the Good Society, for the price of artificial abdominal slings to have been sold by the plaintiff to Mr. J. R. Worthington, the defendant. Summons was issued and served upon a garnishee filed controlling the wages owing, by which latter, on June 21, 1921, the defendant filed a plea of the general issue and a plea of set off. Thereafter on January 6, 1922, a stipulation was filed to the plea of the general issue and a modification to the plea of set off, which stipulation is contained in the record.

On March 20, 1923, there was filed in this court a transcript which recites that it is " a complete transcript of the record" but that transcript shows until date of January 6, 1922, the following:

"This my case before me the undersigned Judge R. Blackmore this Presiding Judge of the Good Court, the Good Old Lake County District, on his attorney, and therefore is according to the

Court that Dr. D. H. Cunningham said defendant was personally served with process of summons issued in said cause ten days at least before the return day thereof, and being solemnly called in open Court, came not, but made default herein,"

On December 22, 1922, the plaintiff, defendant in error, filed in this court an additional transcript of record which recites the proceedings in the trial court which took place on January 6, 1922, and in that record the words "but made default herein" do not appear. There appears in the additional abstract an order dated November 25, 1923, as follows:

> "This day there came on for disposition the motion in writing heretofore filed herein, of The Nokol Company of Illinois, a corporation, plaintiff, by its attorney, to amend the entolled judgment entered herein on January 6, 1922, by striking out from such record the following words: "But made default herein", and upon the unverified suggestions in writing, in opposition thereto presented on behalf of Dr. D. H. Cunningham, the defendant, by his attorneys, and the court having read the affidavit of William A. Rogan in support of plaintiff's motion, and the court having examined the files, Clerk's record and minutes of proceedings had and taken herein, and the transcript of record of this cause filed as a return to the writ of error issued from the Appellate Court, First District of Illinois, in case No. 27831 pending between the above named parties and having heard arguments of the respective attorneys, the court finds that the Clerk of this court, in writing up the record, has, by inadvertence and mistake, written in the order for judgment and in the judgment enrolled the words, "but made default herein", after the words, "being solemnly called in open court, came not", and the court being of the opinion that such erroneous entry in the record be corrected to the end that the judgment as heretofore entered herein should be sustained, and the court being of the opinion that the objections of the defendant to the entry of the order as now prayed for by the plaintiff, are not sufficient in lawor fact to deny to plaintiff such order to correct the record of this court as to such erroneous entry of the Clerk.
>
> IT IS THEREFORE ORDERED by the court that the enrolled order and judgment of January 6, 1922, entered in the above cause be corrected by striking out from such record the words "<u>but made default herein</u>", as same appear after the words "solemnly called in open court came not" and the Clerk of this court is hereby ordered and directed to amend such order of judgment as now enrolled by expunging them from the words "but made default herein", and the Clerk of this Court is ordered and directed to prepare a transcript of this record as ordered amended by this order and to file the same in the Appellate Court, First District of Illinois in cause No. 27831,

Court that Dr. J. R. Overholser will disembark one afternoon served with process of another lawsuit in will which was his first at least before the ceremony had started, and being promptly mulled in open court, some say, but with laudable temper."

On December 24, 1924, the plaintiff, petitioner in error, filed in this court an application commencing of issues which resulted the proceedings in the trial court which took place on January 8, 1925, and in this court on which that made "actual issues" in not answer. Their history is the additional abstract on file in our court December 24, 1924, in relation:

"This day this cause came on for hearing on the motion to strike pleadings filed herein, or the joint demurrer of Illinois, a corporation, plaintiff, to the answer, to amend the amended petition and motion to dismiss, by defendant, by treating and from each counsel and argument, ruled: 'Not a valid defense', and upon the motion filed herein by defendant, to dismiss it upon grounds stated on behalf of M. J. C. Conkright, the defendant, by his attorneys, and the court finding that the allegations of fraud in numerous of plaintiff's petition, and the more having received the fraud, finally proved and answer of defendant and the other parties, and the evidence of defendant at the same time and on a return to the writ of error issued then the conclusions court, right the fact of Illinois, in view to. Court sustaining demurrer the above model petition and taking board dismissed of the petition attorneys, the to at fixed and from the court, in setting to the answer, has, by interpreted and alleges, written in the motion for judgment and in the judgment entered the order, 'has such defendant herein', after the order, 'taking exceptions ruled in long years, now but', and the court being of the opinion that such exceptions ruling in the record to corrected in the not that has judgment in interpretation motion should be overruled, of the error ruling of the relation that the judgments of the relation are in the order of the court in the judgment for by the plaintiff, are not motions in lower fact so they as plaintiff such order to modify the judgment of this right as in with exceptions ruling of the court.

It is therefore ordered by the court that the motion and judgment of counsel of 1924, motion in the above cause to modified by striking the from which should the words 'has made defendant herein'. as was stated after the word 'plaintiff' which is open court and not the fact of this court in motion motion and judgment in lower and order of judgment as the motion of judgment than the motion 'has made defendant herein', and the fact of this court in motion the judgment to judgment a necessity of this motion be stricken by which order in the judgment in the Lafayette court, right fraudent of Illinois in cause motion.

as a return to the writ of error as above entitled."

The brief for the defendant was filed in this court on September 18, 1922, before the Additional Transcript of record was filed, and the argument therein on behalf of the defendant is that as a "default" was entered against him while he had certain pleas on file undisposed of, there could be no assessment of damages and judgment.

As the complete record now before us shows that no default was taken, that the words "but made default herein", were originally written in by a misprison of the Clerk of the Court, and as the judgment roll as set forth in the transcript of record shows that the cause was tried in due course upon issues joined, and not upon a default, and that the jury was sworn "to try the issues joined and a true verdict render according to the evidence" we are bound under the law to hold that the proceedings of the trial court were regular and binding.

There is no bill of exceptions and, under the circumstances, what the record shows transpired may not be challenged.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

as a factor in the evil it sought to cure by legislation.'

The total for the defendant was filed in this court on September 12, 1890. Late in the Additional Transcript of record was filed, and the argument herein on behalf of the defendant is that as a 'factory' was entered against his whole in the certain place on its multiferous of, there could be no estoppel of the-eyes and judgment.

In the complete record has before us alone that no default was taken, that the words 'not made defendant herein', was originally written in by a stenographer of the clerk of the court, and on the judgment roll in our town in the handwriting of counsel alone that the court was tried in the county upon issues joined, and not upon a default, and that the judge was asked to try the issues joined and a time reasonably required according to the evidence we are bound under the law to hold that the proceedings of the trial court were regular and binding.

There is no bill of exceptions and, under its agreement, that the record alone examination may not be challenged.

The judgment, therefore, will be affirmed.

(Signed)

O'Connor, J. (for Dickinson, J. Brown.

3507a

136 - 27870

H. D. FOWLER, Appellee, v. UNION SCHOOL FURNISHING COMPANY, a corp., Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 520

Opinion filed Dec. 26, 1923.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Fowler, on April 10, 1920, brought suit in the Municipal Court for $2988.00 and interest for certain alleged commissions claimed to have been earned by the sale of certain school supplies for the defendant, the Union School Furnishing Co. There was a trial, without a jury, and a judgment for the plaintiff in the sum of $3121.73. This appeal is therefrom.

The plaintiff's statement of claim contains three charges. First, that on October 1, 1909 he was employed by the defendant to sell certain books, maps, desks and other school supplies in Montana, at certain fixed prices; that he was to be paid for his services by commissions "out of the proceeds of said sales"; that he sold goods to the amount of $317.65, on which the agreed commission was $158.86; "that the defendant has received proceeds of said sales" and as a result the latter amount accrued to him prior to October 1, 1910. Second, that on June 14, 1910, he was employed, under a written contract, to sell

H. G. FORMAN, Appellee, v. DAVID EDWARD ROSENBLUM COMPANY, a corp., Appellant.	Appeal from Municipal Court of Chicago.

Opinion filed Dec. 18, 1939.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Forman, on April 12, 1937, brought suit in the municipal court for $1500.00 and interest for certain alleged commissions claimed to have been earned by the sale of certain school textbooks for the defendant, the Rosenblum Company, Inc. There was a trial, without a jury, and a judgment for the plaintiff in the sum of $2311.72. This appeal is therefrom.

The plaintiff's statement of claim consists under counts. First, that on January 1, 1929 he was employed by the defendant to sell certain books, maps, charts and other school supplies in Michigan, at certain fixed prices; that he was to be paid for his services by commissions "out of the proceeds of said sales"; that in said goods to the amount of $317.00, on which the agreed commission was $158.50; "that the defendant has received proceeds of said sales" and is a result has failed account for the prior to October 1, 1930. Second, that on June 14, 1930, he was employed, under a written contract, to sell

school supplies in Colorado, for which he was to be paid certain commissions "out of the proceeds of such sales"; that under that contract in 1910 his commissions amounted to $2177.28 Third, that on November 10, 1910, he was employed, under a written contract, to sell certain school supplies in Oklahoma for thich he was to be paid as commissions, a certain proportion of the sale price as set forth in the contract; that in 1910, 1911 and 1912 he sold thereunder such supplies that his commissions amounted to $4383.21.

The statement of claim, also, recites that his total commissions under the three contracts amounted to $7343.35, "all of which commissions were to be paid by the terms of said contract, out of the proceeds of said merchandise"; "that the defendant has received prior to the first day of January, A. D. 1916, all of the proceeds of said sales, whereby all of the commissions aforesaid became payable to the plaintiff and that all said transactions constituted a continuing account"; that of the total commissions amounting to $7343.35, the defendant has paid to the plaintiff $4359.35, and that there is now due and owing to the plaintiff the sum of $2988.00, with interest at the rate of five per cent, since January, 1916.

The affidavit of merits recites, that the plaintiff was employed as a traveling salesman; that when two or more salesmen made sales it was the custom for their commissions to be divided; that the plaintiff's commissions for sales in Montana amounted to $137.86; that he had a drawing account on which he drew $158.86; that his commissions in Colorado amounted to $2017.87; that he drew and received $2177.28; that his commissions on sales in Oklahoma amounted to $3485.94;

school supplies in Colorado, for which he was to be paid certain commissions "out of the proceeds of such sales"; that upon that account in July the commissions amounted to $[illegible].36 which, when on November 15, 1920, he had employed, under a written contract, to sell certain school supplies in Colorado for which he was to be paid commissions, a certain production of the sale price he was there to the contract; that in July, 1921 and 1922 he sold therewith such supplies that his commissions amounted to $[illegible].

The statement of claim, like, treating that all total commissions under the three contracts amounted to $[illegible].36, "all of which commissions were to be paid by the terms of said contracts, but at the rate of [illegible] per month"; "that the defendant has failed and refused so the first day of January, 1, 1922, all of the commissions of said sales, having all of the commissions aforesaid become payable to the plaintiff and that he has therefore constituted a contingent account"; that of the total commissions according to $[illegible].36, the defendant has paid to the plaintiff $[illegible].36, and that also in the [illegible] to the plaintiff the sum of $[illegible].[illegible], with interest at the rate of five per cent, since January, 1921.

The affidavit of merits contains, that the plaintiff was employed as a traveling salesman; that the [illegible] salesman made sales if was the custom for their commissions to be already; that the plaintiff's commissions for sales in [illegible] amounts to $[illegible].[illegible]; that he had a [illegible] on which on June [illegible]; that his commissions in Colorado amounted to $[illegible].[illegible]; that he disconsolatedly on sales to customers [illegible] $[illegible].[illegible];

that of the sales made by him in Oklahoma, there remains $5961.50 for which the defendant has not received final collections in cash; that by the terms of the contract the defendant has retained one third of the $3485.94; that is $1161.98 leaving a balance of $2323.96, which the plaintiff was entitled to as his share for sales in Oklahoma; that he had a drawing account and drew thereon the sum of $2130.71; that by the contract, it was agreed as to sales in Oklahoma, that the defendant should retain one third of all commissions accruing to the plaintiff until final collections for said sales were made in cash; that there are several thousand dollars not yet collected by the defendant, though it has diligently endeavored to collect all that was due; that the defendant does not owe $158.86 for sales made in Montana, nor $2177.28 for Colorado, nor $2988.00 for Oklahoma.

The affidavit of merits denies that there was a continuing account, but sets up that each contract was separate, and that no money was paid to him as commissions but was advanced "in the nature of a drawing account against sales made by the plaintiff." The chief question that arose at the trial was whether the plaintiff was entitled to commissions immediately upon a sale being made or whether, in regard tothe sales made in Colorado and Oklahoma - there being no substantial claim as to commissions for sales in Montana - the plaintiff's rights to compensation matured only when the defendant had actually received the proceeds of the plaintiff's sales. The pleading of the plaintiff sets up that he

that of the notes made by him in Oklahoma, there remains $2000.00 for which the defendants has not received final satisfaction in cash; that by the issue of the amounts the defendant has retained one third of the $2000.00; that is $1333.33 leaving a balance of $666.67, which the plaintiff was entitled to as his share for notes in Oklahoma; that he had a banking account and drew therefrom the sum of $1133.71; that by the contract, it was agreed as to notes in Oklahoma, that the defendant should retain one third of all commissions according to the plaintiff until final collections for said notes were made in cash; that there was earned thereunder dollars not yet collected by the defendant, though it has diligently endeavored to collect all that are due; that the defendant has on hand $1240.58 in notes made in Kansas, but $117.39 for Oklahoma, not figuring for delivery.

The sufficiency of merits denied that there was a misstanding concerning, but arose up that each contract was entirely, and that in equity was paid to him as commissions for work advanced "in the nature of a drawing account against notes made by the plaintiff." The first proposition that seems as the trial was whether the plaintiff was entitled to commissions immediately upon a sale being made or whether, in the proper table made by in Kansas and Oklahoma - there being no substantial claim as to commissions for notes in Kansas - the plaintiff's right to commissions matured only when the defendant had actually received the proceeds of the plaintiff's notes. The pleading of the plaintiff puts up that he

was entitled to compensation only out of the proceeds of his sales, but, at the trial, he put in evidence somewhat at variance with that claim. All the evidence for the plaintiff consists of his own testimony and a series of exhibits. Pursuant to two letters from the defendant, dated June 4, 1910, the plaintiff went to work in Colorado. His business was to get orders from the various school districts and send them in to the defendant. The goods would be shipped out by the defendant, and, generally, would be paid for in school warrants. Some of the warrants were payable on demand and some on time. Some of them were never paid.

In Colorado the plaintiff's commissions - which were the difference between the cost and selling price - amounted, according to his testimony, to $2805.28, and according to the statement of the defendant's bookkeeper, which the plaintiff offered in evidence, amounted to $2638.38. The latter amount, the plaintiff says is for commissions on sales that were delivered. One Marguerat, bookkeeper for the defendant testifying from the books of the defendant, stated that the face value of the plaintiff's total sales in Colorado was $8972.97, on which the defendant had collected $8188.80, and that the plaintiff's commissions, on the latter amount were $2447.54.

In Oklahoma the plaintiff's commissions, according to the terms of a letter of November 10, 1910, containing a proposition of employment, and accepted by the plaintiff, were "thirty per cent.on apparatus and supplies sales, and 15 per cent. on furniture and state sales, 1/3 of which

was unfair to exonerate only about the proceeds of his sales, but, at the trial, he had no evidence showing at variance with that claim. All the witnesses for the plaintiff testify of his own knowledge as a matter of existence. Summons in the lawsuit from the defendant, dated June 4, 1970, the plaintiff went to work in Jakarta. His business was to get orders from the various school-girl trade and send them in to the department. The goods would be shipped out by the department, and, presumably, would be paid for in school vouchers. Some of the orders were payable on demand and some on time. Some of them never paid.

In balance the plaintiff's evidence - which was the difference between the sum not selling price - computed, according to his testimony, to $9000.00, not according to the statement of the defendant's bookkeeper, which the plaintiff alleged is untrue, amounted to $8000.00. The latter amount, the plaintiff says he for some reason or other was not allowed. The defendant, witnesses for the defendant testifying from the books of the company, stated that the total of the plaintiff's total sales to October the 20th,1970, on which the defendant had collected $10,000.00, and that the plaintiff's commissions, on the latter sales, were $847.54.

In October the plaintiff's employment, according to the terms of a letter of November 19, 1970, constituting a promotion of employment, but accepted by the plaintiff, was "thirty per month, on expenses and supplies only, and 15 per cent, on Jakarta and other sales, 1/2 of which

of which commissions is to be retained by U.S.F. Co. (the defendant) until final collections are made in cash by U.S.F. Co."

An examination of the evidence shows that, if we assume the allegation of the statement of claim that all of his "commissions were to be paid out of the proceeds of said merchandise", to be true, then there is now no ground for a finding in his favor, as he has failed to show that the defendant has not paid him the full amount due him out of whatever proceeds of sales were actually received by the defendant. The plaintiff, however, put in evidence certain statements of account admittedly made out by the bookkeeper of the defendant, and endeavored by them to show that something was still due him. We have not been furnished with any brief on behalf of the plaintiff. An examination of the accounts, taken in conjunction with the testimony of Marguerat, the bookkeeper, that the statements were given the plaintiff to show how his account appeared on the books providing the proceeds of the various sales were collected, and bearing in mind the plaintiff's allegations that he was only to be paid out of the proceeds of sales, and his own testimony, although somewhat ambiguous on the subject, and the testimony of the defendant's witnesses, Herring, Olson and Tutwiler, leads irresistably to the conclusion that the plaintiff has entirely failed to show that that he is entitled to anything more than he has already received. The three witnesses just referred to, also Marguerat, all testify that the plaintiff knew, as he alleged in his statement of claim, that he was to be paid only out of the proceeds of the sales he made, and Marguerat showed from

of which complaining is to be rectified by U.S.P. Co.
(the defendant) until that satisfaction has been in some
by U.S.P. Co.?

In consideration of the evidence presented, it
is manifest the allegations of the plaintiff to which that
all of his "complaints were to be filed by of the plaintiff
made of said defendant". In so doing, then, there is now
no ground for a finding in his favor, as he has failed
to show that the defendant has not met the duty that rested
due him by of whatever grievance of which he was actually
received by the defendant. The plaintiff, however, has in
evidence without testimony of witness substantially made out
by the knowledge of the defendant, not authorized by them
to make that according was still due him. He has not been
satisfied with any belief in behalf of the plaintiff. In
consideration of the evidence, which is conflicting with the
testimony of witnesses, the plaintiff, that the statement
made claim the plaintiff to show not his income expected
on the books presented the records of the matter which
were following, not having to find the plaintiff's expe-
ditions that he was duty to be just and of his payment of
dues, and his own testimony, although numerous discussions
on the subject, not the testimony of his colleagues's witnesses,
meeting, claim and finding, issue investigation to the con-
clusion that the plaintiff has minority failed to show that
that he is entitled to recovering more than he has already re-
ceived. The terms witnesses and received the same testimony,
all basis that the plaintiff knew, to be alleged in the
statement of claim, that he has to be made only and of the
property of the action be made, not suggested should the

the books of the defendant that, on that basis, the plaintiff had drawn more than he was entitled to. The suit was begun on April 10, 1930, although, the accounts offered in evidence are dated in January, 1918, a hiatus of nearly twelve years.

After carefully considering all the evidence we are of the opinion that the judgment is clearly against the manifest weight of the evidence. The judgment will, therefore, be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find as a fact that the contract was that the plaintiff should be paid commissions only out of the proceeds of sales, that is, after they were received by the defendant, and that, all such commissions, he had already been paid.

O'CONNOR, J. AND THOMSON, J. CONCUR.

the books of the intended sheet, as that words, the plaintiff has taken more than he was entitled to. The evil has been so great in 1880, although, the opinions differ in minds are united in saying, 1883, a return of nearly twice years.

After carefully considering all the evidence on the opinion that the judgment is clearly against the manifest weight of the evidence. The judgment will, therefore, be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find as a fact that the evidence has that the plaintiff should be paid commissions only on the proceeds of sales, that is, after they were received by the defendant, and that, in such accounting, he has already been paid.

O'CONNOR, J. ALL CONCUR, J. PRATT.

(3508)

186 - 28021

JOHN LITWAITES, also known as JOHN LEPWIETES, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
JOHN L. WALKER COMPANY, a corporation, Appellant.	232 I.A. 220

Opinion filed Dec. 26, 1923.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Litwaites, having insured a 1917 automobile with the defendant, and as it was subsequently stolen, brought suit and recovered a judgment in the sum of $450.00. This appeal is therefrom.

The trial took place before the court without a jury. The evidence showed that the plaintiff owned the automobile; that it was insured with the defendant; and that it was stolen on the evening of July 6, 1921. Counsel for the defendant contends, (1) that the plaintiff failed to comply with a certain provision of the policy in regard to a locking device; (2) that he did not comply with the requirement of the policy in regard to giving notice, and (3) that the evidence of value showed that the automobile at the time it was stolen was worth not over $300.00.

(1) As to the locking device provision. It was provided in the policy - by an express endorsement - that "In consideration of a reduction in premium, it is warranted by the assured that the automobile * * * will be continuously

JOHN ALTHAUSEN, also known as
JOHN ALTHAUSEN,

Appellee,

v.

JOHN C. WILLIAM SHANNON,
a respondent,

Appellant.

Opinion filed Dec. 20, 1962.

Ca. Proceeding during trial delivered the
opinion of the court.

The plaintiff, Althausen, having instituted a
1957 ejectment suit with the defendant, who is in the undis-
puted sole, lawful and peaceful possession, a judgment in
the sum of $800.00. Side appeal is questions.

The trial court sitting without the jury entered
a jury. The evidence showed that the DEFENDANT owns the
premises; that it was leased with the plaintiff; at that
it was sold on the evening of July 4, 1957. Against the
the following evidence, (1) was the plaintiff entitled to
enjoy with a certain portion of the yard in regard to
a locking below; (2) was he did not notify the tenants
was of the notice to vacate in writing before; and (3) did
the evidence of which clearly that the evidence or the time
it was stated was within the 5MO.CC.

(1) As to the locking device contention. In the
unrelated in the yelling - by an unknown bellhound - that
the communicating of a locking in question, it is evidence by
the counsel that the defendant's " " will be continuously

equipped with a locking device known as approved lock (approved by the Underwriters Laboratories and bearing their label.) The assured undertakes during the currency of this policy to use all diligence and care in maintaining the efficiency of said locking device and in locking the automobile when leaving same unattended." The evidence of the plaintiff is that he had a patent lock, the name of which he did not know, which he got with the automobile and that when he put it on it was all right; and was in good condition the last time he looked at it; that at the time the agent of the defendant examined the automobile - in order to determine whether the insurance policy should be issued - that lock was on and "looked at" by the insurance agent; that just before he, the plaintiff, went into the saloon, shortly before the automobile was stolen, he locked the automobile with a patent lock. One Pietluck testified that the plaintiff before he went into the saloon locked it; that it was locked in the shifting gears. There was no evidence put in on the part of the defendant as to the lock. Under those circumstances, the agent of the defendant having examined the lock that was then on the automobile in order to determine whether a policy of insurance should be issued and seemingly being satisfied with it, and making no objection to it, and the defendant at the time of the trial having put no evidence in on that subject, it seems only reasonable to hold that no complaint may now be made on that score.

(2) As to notice of the theft. On July 6, 1921, late in the afternoon, the plaintiff and one Pietluck drove out to Lyons and stopped in front of a soft drink parlor

analyzed with a looking-glass lower as expected loss (incurred by the underwriting indemnification and bearing that label.) The actual underwriting during the overseas of this policy is not all different and more in relation- ing the efficiency of anti loading ratios and in learning the automobile when learning more unfavorable. The ori- gins of the plaintiff is that he had a perfect look, the mass of which is fit not loss, which he got with the automobile not back when of and it is he is was his right; and was in good condition the last time or insured at; that at the time the report of the defendant examined the automobile - in order to determine whether the insurance policy should be issued - this look was not and "looked as" by the insurance agent; that just before he, the plaintiff, went into the engine, directly before the engine mobile was stolen, he looked the automobile with a perfect look. The jury found certified that the liability before he went into the engine looked in; that it was looked in the shifting gears. There was no evidence put in on the part of the defendant as to the loss. Under some circumstances, the agent of the defendant having examined the look that was when on the automobile in order to determine whether a policy of insurance should be issued and actually being satisfied with it, and raising no objection to it, and the statement at the time of the trial having not so evidence in on that subject, it seems only reasonable to hold that no complaint may now be made on that score.

(3) As to motion of the State. On May 8, 1921, late in his afternoon, the plaintiff and one Clayton Grove out to Lyons and stopped in front of a soft drink parlor

(called by some of the witnesses a saloon) belonging to one Braje. They got out, and after the plaintiff had locked the automobile, they went in. When they came out, half and hour later, it was gone. The plaintiff and Braje both say that they called up the police department and reported the loss. The plaintiff testified that the next day he called up the defendant and talked over the telephone with some one there, told them his car was stolen, and was requested to come down. He did not know with whom he talked. On cross-examination he testified that some one else talked for him; that he told the one telephoning to report that the car was gone.

He further testified that six days later, he went down to the office of the defendant and was given a paper to fill out and to bring back with the bill of sale for the automobile. On that subject, on cross-examination, he testified that he went to the insurance company's office and asked for information; that he saw the manager and told him that his car was stolen; that the manager gave him a piece of paper to fill in on each side and bring back with the bill of sale; that he took it back, filled in, the next day and gave it to a man, named Wyckoff, (pointing him out in the court room). He testified on redirect examination that the paper was filled out for him by a real estate man; that he did not know what he wrote down; that he does not read English well; that the real estate man told him what was in the paper; that he answered everything the real estate man asked him; that later, in October, 1931, he was at the defendant's office, with one Corcoran, and talked the matter

(still by some of the elements a mirror) belonging to our brain. Then one not, and after the electricity had locked the automobile, they went to. Then they came out, met and how listen, it was gone. The visibility was drags with my that they filled in the police department did remained the lines. The visibility twelfthen from the more day to called up the department and called over the overpass with some man shown, said here his car was stolen, and was suspected to come down. He did not know what kind he called. On cross-examination he testified that when his car stolen for hit that he left the car intending to return that the car was gone.

Mr Wallace testified that the boys later, he went down to the office of the detective and was given power to fill out and to bring back with the bill of sale for the automobile. On this subject, on cross-examination, he testified that he wrote the insurance company after and asked for information. That to use the company not had the that his car was stolen that the insurance gave him a mirror of power to fill in on such sale was using that the bill of sale that he had to bring back, filled in, the car cry and gave it to a man, stand by that. (pointing the car in the court room). He testified on redirect examination that the paper was filled out for him by a just stand that he did not know what he was doing that he was not just English well; that the last notice was sold his car was in the years; that he examined everything the two events was saved the that lines, in number, 1931, he was at the detective's office, with one witness, not taken the witness

over with Wyckoff.

For the defendant Wyckoff testified that he was the claim agent for the defendant; that no report of the theft was made to him until October 29, 1921, when the plaintiff and his attorney Corcoran called; that at that time he told the plaintiff he had never seen him before and never had a telephone conversation with him; that he, Wyckoff, handled every claim that came into the office; that he searched the files and found no such claim; that in October he denied the claim because it was reported too late.

One Wanda Reis testified for the defendant but as she was absent on her vacation from July 6 to July 16, 1921, her evidence is negligible, save that she stated the method of doing business in defendant's office, and that when one reporting a loss is handed a blank to fill in before a notary, no record is made of the loss unless he brings in a written report.

From the foregoing, it will be seen that whether the plaintiff gave such immediate notice as the defendant under the policy was entitled to, involved a seriously contested matter of fact. Undoubtedly, the evidence of the plaintiff, taken by itself sufficiently proves apt notice. But, it is contradicted, if not altogether, at least in great part, by Wyckoff. Is that sufficient to justify concluding that the judgment of the trial judge is clearly against the weight of the evidence? The trial judge saw the witnesses and, so, was much better situated than we are to pass upon their credibility. The plaintiff says he called, almost at once, at the defendants office,

over his ipsedixit.

Yet the material ipsedixit contains that he was the alibi agent for the defendant; that he phoned at the times he made it his until noonday 23, 1951, when the plaintiff and his attorney corrected saying that at that time he told the plaintiff he had never seen his brother and never had a telephone conversation with him; that he, ipsedixit, handled every claim that came into the office; that he searched the files and found no such claim; that it cannot be located the claim because it was expunged too late.

One month this testified for the defendant but he was absent on his vacation from July 6 to July 16, 1951, but evidence is negligible, save that he stated the method of doing business in defendant's office, and that when one requesting a loan is handed a blank to fill in before a notary, no record is made of the loan unless no charge is a written report.

From the foregoing, it will be seen that whether the plaintiff gave such immediate notice to his insurance carrier the policy was avoided is, involved a mutually contested matter of fact, understandably, the evidence of the plaintiff, taken by itself sufficiently proves ipsi notice. But, if it is contradicted, if not disputed, at least in good part, by ipsedixit. Is that sufficient to justify court saying that the judgment of the trial judge is clearly against the weight of the evidence? The trial judge saw the witnesses and, so, was much better situated than we are to pass upon their credibility. The plaintiff may be called, almost at once, an the insurance office.

and gave notice of the theft. Wyckoff intimates that when the plaintiff called with his attorney, Corcoran, it was claimed that notice had already been given. So, the plaintiff's claim at the trial was not an after thought. Looking carefully over all the evidence no such discrepancies are found that seem in any way to justify overriding the judgment of the trial judge.

(3) As to the evidence of value. The plaintiff testified that he bought the automobile which is known as a Madison of the year 1917 in the year 1920, and used it until it was stolen in December; that he paid $900.00 for it. The plaintiff when asked what the fair market value of the automobile was on the day it was stolen put the figure at $900.00. At the time he testified, he stated that he owned a Reo and that, prior to the time he bought the Madison, he owned a Ford. One Klak, who testified for the plaintiff stated that he had had an automobile for about four or five years; that he, himself, owned three different automobiles and that he had an opinion as to what the fair and reasonable value of the plaintiff's automobile was on July 6, 1921; that he saw the plaintiff's automobile on July 6, 1921, and that he had seen it prior to that time and had ridden in it two or three times; that in his judgment it was worth $800.00 or $900.00. His testimony on cross examination was somewhat ambiguous but that seems to have been cleared by his testimony on redirect examination where he says that "the car was pretty near like new"; that "It was a good going car". He further testified, "I know that machine, because I have bought machines and I know what it cost me for my machine. I know what a second hand machine is worth, a Dodge, I bought and

and gave notice of the start. Tyndall testified that when the plaintiff called with his attorney, Carroll, it was without that notice had already been given. By, the plaintiff's claim at the trial was not an after thought. Looking carefully over all the evidence as much circumstance are found that seem to any to justify everything the judgment of the trial judge.

(2) As to the evidence of value. The plaintiff testified that he bought the automobile which is known as a Hudson of the year 1917 in the year 1920, and used it several it was stolen in December; that he paid $900.00 for it. The plaintiff when asked what the fair market value of the automobile was on the day it was stolen put the figure at $800.00. At the time he testified, he stated that he used a car and that, prior to the time he bought the Hudson, he owned a Ford. One Clark, who testified for the plaintiff stated that he had had an automobile for about four or five years; that he, himself, owned three different automobiles and that he had an opinion as to what the fair and reasonable value of the plaintiff's automobile was on July 6, 1921; that he saw the plaintiffs automobile on July 6, 1921, and that he had seen it prior to that time and knows an it two or three times; that in his judgment it was worth $800.00 or $900.00. The testimony as given concerning was somewhat conflicting but that seems to have been cleared by his testimony on redirect examination where he says that "the car was pretty good like new"; that "it was a good going car". On further testified, "I know that machine, because I have bought machines and I know what I could get for my machine. I have what a second hand machine is worth, I bought and

paid $500.00 for it in 1916, that machine, and I know what that machine was worth to run, and his machine was worth more than mine." When asked by the trial judge what was the fair cash market value of the plaintiff's automobile on the day it was stolen, the witness answered, "Just as I say, $800.00; between eight and nine hundred dollars."

There was evidence introduced for the defendant to the effect that the manufacture of the Madison automobile was discontinued in 1917 and that as a result the reasonable market value of the plaintiff's automobile was thereby considerably reduced. One Keeling, who had never seen the plaintiff's automobile, testified that a 1917 Madison touring car bought in 1930 as a used car would have a reasonable cash market value in July, 1931, of between $200.00 and $300.00. On cross-examination he stated that if the representative of the insurance company in examining the plaintiff's automobile about November 15, 1920, put its value at $500.00 his judgment would be that that figure was very high. One Leatherman, an automobile insurance adjuster testified that, assuming the manufacture of Madison cars ceased in 1917, the plaintiff's automobile would be worth from $150.00 to $300.00. He, however, had never seen the plaintiff's automobile.

Considering carefully all the evidence on the subject of market value, we do not feel justified in concluding that the trial judge erred in fixing the plaintiff's damages at the sum of $450.00.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

paid $200.00 for it in 1918, that matter, but I also that that machine was worth to you, and his machine was worth more than mine." When asked by the trial judge what was the fair open market value of the plaintiff's automobile on the day it was stolen, the witness testified, "Just be I say, $700.00; between city and line Central Station."

There was evidence introduced for the defendant to the effect that the manufacturer of the Indian motorcycle was discontinued in 1917 for this as a result the reasonable market value of the plaintiff's automobile was further considerably reduced. The testimony was but never show the plaintiff's automobile, evidence that a 1917 Indian motorcycle was bought in 1920 on a used car would have a reasonable open market value in July, 1921, of between $200.00 and $300.00. On cross-examination he stated that if the superintendent of the insurance company in examining the plaintiff's automobile under governor 18, 1920, put its value at $200.00 his judgment would be that the figure was very high. The defendant, in supposedly instructing different testimony that, assuming the measurements of damages were proper in 1917, the plaintiff's automobile would be worth from $700.00 to $800.00. He, however, did never know the plaintiff's automobile.

Considering carefully all the evidence in the defendant's motion of another review, we do not find justified in concluding that the trial judge erred in finding the plaintiff's damages in the sum of $400.00.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

CHAMBERS, J. and TURNER, J. DISSENT.

(3509a)

311 - 28046

GEORGE B. SAPOLSKI,

Appellee,

v.

LOUIS KUICKI, et al On appeal of LOUIS KUICKI,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I. A. 520

Opinion filed Dec. 26, 1923.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On April 2, 1914, the plaintiff, George B. Sapolski, brought suit against the defendant Louis Kuicki and John Kuicki (the latter was subsequently dismissed out of the suit), for damages for being run into and injured by an automobile driven by the agent of Louis Kuicki. On April 15, 1921, there was a trial, and a verdict, and judgment thereon in favor of the defendant. On June 4, 1921, a new trial was granted. On February 17, 1922, there was a second trial, with a jury, resulting in a verdict and judgment in favor of the plaintiff against the defendant in the sum of $1500. This appeal is from that judgment.

The declaration consisted of two counts, the first alleging negligence in the operation of a certain automobile owned by the defendant; and the second, alleging the violation of Section 2484a of an ordinance of the City of Chicago, which provides that vehicles shall not pass or approach within ten feet of a street car while it is stopped or remains standing for the purpose of discharging or taking on passengers. The defendant filed a plea of the general issue.

GEORGE A. MATHEWS,

Appellee,

v.

LOUIS KOTKI, et al on appeal of LOUIS KUTKI,

Appellants

Opinion filed Dec. 24, 1924.

Mr. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

On April 2, 1924, the appellee, George A. Mathews, brought suit against the defendants Louis Kotki and John Kotki (the latter was subsequently dismissed out of the suit), for damages for injury, his face and shoulder to be automobile driven by the agents of Louis Kotki. On April 15, 1921, there was a trial, and a verdict and judgment thereon in favor of the plaintiff. On June 4, 1921, a new trial was granted. On February 27, 1922, there was a second trial, with a jury, resulting in a verdict and judgment in favor of the plaintiff against the defendant in the sum of $2000. This appeal is from that judgment.

The declaration consisted of two counts, the first alleging negligence in the operation of a motor automobile owned by the defendant, and the second, alleging the violation of section 2a of an ordinance of the city of Chicago, which provides that vehicles shall not pass or approach within ten feet of a street car while it is stopped or remains stopped for the purpose of discharging or taking on passengers. The defendants filed a plea of the general issue.

About 6 p.m. on August 6, 1913, the plaintiff, a man 35 years of age, employed by the Crane Company, going home from work, got off a southbound street car near or at the intersection of Ashland avenue, a north and south street, and 19th street, an east and west street, and was struck by a southbound automobile owned by the defendant.

It is the theory of the plaintiff that he got off the street car after it had made its regular stop on the north side of 19th street, and while it was standing still, and that the defendant's automobile violated the ordinance and came along without stopping, and, in undertaking to pass the street car while it was standing still to let off passengers, it struck and injured him.

On the other hand, it is the theory of the defendant, that the automobile stopped ten or more feet back of the street car when the street car made its regular stop on the north side of 19th street, and that, after the street car had started up again, to go south across 19th street, and while the street car was in motion, the plaintiff jumped out and without negligence on the part of the defendant was struck and injured.

It is contended for the defendant: (1) that the verdict is against the weight of the evidence; (2) that error occurred in rulings upon the evidence; and (3) that errors were made in regard to certain instructions.

(1) Was the verdict against the weight of the evidence? The evidence of the plaintiff himself is that he asked the motorman to let him off at the next crossing,

About 6 p.m. on August 6, 1911, the plaintiff, a man 65 years of age, employed by the Queen Company, going home from work, got off a motorbus across our case at the intersection of Bathurst avenue, a north and south street, and Lake street, an east and west street, and was struck by a motorcycle automobile owned by the defendant.

It is the theory of the plaintiff that he got off the street car after it had made the regular stop on the north side of Lake street, the bus being in was standing still, and that the defendant's automobile violated the ordinance in not slowing or giving signals, and, in violating that, in not the street car which it was passing still in its all passengers, it struck and injured him.

On the other hand, it is the theory of the defendant, that the automobile stopped ten or twelve feet back of the street car when the street car had the regular stop on the north side of Lake street, and that, after the street car had started up again, he go south across Lake street, and while the wheels are in motion, the plaintiff jumped out and without assistance on the part of the defendant was struck and injured.

It is contended for the defendant: (1) that the verdict is against the weight of the evidence; (2) that prejudicial error in judge upon the evidence; and (3) that errors were made in regard to certain instructions.

(1) As to the verdict against the weight of the evidence: The evidence of the plaintiff clearly is that he came the motorman to let him off at the next crossing.

which was that of 19th street; that the motorman slowed down the car, stopped it, opened the door and let him out, and that he did not "have a chance to turn around, so I did not see anything and I was struck down." On cross-examination, he testified that when he got to the front platform the car was yet quite a distance from 19th street, but was slowing down; that when he asked the motorman to open the door, some man was standing in the way and when he, the witness, excused himself, the man moved toward the motorman and let him get off; that when the door was being opened, the car was stopped; that when he got off he was right opposite the crosswalk and faced south; that he took two or three steps south, and then about one north when he was hit; that he did not know what part of the automobile hit him. The evidence of the plaintiff is corroborated by the motorman, who testified that his car stopped and he let off some passengers, one of whom was the plaintiff, and then started the car, and as he started the car he heard the automobile coming; that no one jumped off the platform while the car was moving. On cross-examination, he testified he saw the plaintiff go out of the door; that he got the bell to start the car before the plaintiff really got off the front platform, and that as soon as the plaintiff got off he, the motorman, turned his lever to start ahead. Likewise one Cibauski, an employee of the Royal Life Insurance Company, corroborated the testimony of the plaintiff. His evidence is to the effect that he was on the front platform, and that the car stopped at its regular stopping place; that the plaintiff got off after the street car stopped, and when he had gone two or three steps, the automobile ran over him and knocked him down. On cross-examination, he testified that in

which was that at 1:30 o'clock that the defendant closed down the car, stopped it, opened the door and let his son, and that he did not "have a chance to turn around, so I did not see anything and I was around then." On cross-examination, in testimony that was as yet the first platform the car was yet just a little from 12th street, but was slowing down; that when he walked the motorman to open the door, then was sitting in the car and when he, the witness, walked toward, did you approach the motorman and let him get off; that when the door was being opened, the car was stopped; that when he got off he was right opposite the crossing and first porch; that he took two or three steps there, not that there too much when he was hit; that he did not know what part of the automobile hit him. The testimony of the plaintiff is corroborated by the witness, who testified that his son stepped and he let off some passengers, and at that was the plaintiff, and then started for car, and as he stepped off he heard the automobile coming; that as one stepped off the platform while the car was moving. On cross-examination, he testified he saw the plaintiff go out of the door; that he got the bell to start the car before the plaintiff really got off the front platform, and that is when he the plaintiff got off he, the motorman, turned his lever to start ahead. Witness and Gibbonsil, an employee of the Boyd Bill Insurance Company, corroborated the testimony of the plaintiff. His evidence is to the effect that he was on the front platform, and that the car stopped at the regular stopping place; that the plaintiff got off after the street car stopped, and even as he had gone one or three steps, the automobile ran over him and knocked him down. On cross-examination, he testified that in

his opinion the plaintiff was the third one to get off; the first one being a woman. There were details he said he could not testify to, as the occurrence took place many years ago. He further testified that the plaintiff walked out while the car was standing perfectly still, and the auotmobile ran into him after he had walked two or three or four steps. The evidence of the plaintiff, Andres, and Cibauskis, also, is corroborated by the testimony of Dixon, the conductor of the car in question. He testified, "Well, my car came right to a stop there and the passengers alighted from the front end of the car; and during the time the plaintiff was alighting from the car this machine come up from the rear, passed by the car and struck this man and knocked him to the sidewalk." He further testified that the automobile did not stop before it struck the plaintiff. On cross-examination, he testified that no passengers got off the rear of the car; that he looked out of the back platform after the automobile had gone by the back end; that he had been looking out "because when that machine had been approaching the rear of that car, I could practically see that it wasn't going to come to a stop, which they generally do some ten or fifteen feet back of the car;" that the street car stopped right in front of the crosswalk at 19th street, and when he looked out along the side of the car south he saw the plaintiff stepping off the car; that he took about three steps before the automobile struck him; that he did not ring his bell to go on until after the plaintiff was left in charge of a police officer; that he had sounded no bell before that time. As to whether the street car was in motion at the time plaintiff got off, the witness Anna Donarski testified that the car stopped at its regular stopping place; that she saw the plaintiff get off the car, and that the front

part of the automobile hit him. She also testified that the street car was standing still at the time the door of the street car opened. Also one Jaworski, a carpenter, who was standing about 90 feet north of 19th street, on the west side of Ashland avenue, corroborated the testimony of the plaintiff. He testified that thecar stopped at 19th street, "and before the corner. Then the automobile come and didn't stop, run away ahead, and the man got off there, off of that car, and got knocked down and rolled there about three feet to the curb." He further testified that the automobile was going fast and did not stop before it reached the street car. On cross-examination, he testified that the street car had stopped and the automobile had gone ahead without stopping. As to the position of the street car at the time the plaintiff was injured, the witness Pauline Wheeler testified that it was stopped right on the north corner of 19th street, and stopped there all the time; that she did not actually see the collision; that when she saw the plaintiff he was lying right close to the street car rolling towards the back end.

It would seem, therefore, that the evidence for the plaintiff, by itself, and if believed by the jury, shows quite overwhelmingly that at the time, the automobile was being driven in violation of the City ordinance, and also that the plaintiff was in the exercise of ordinary care. But it is urged by counsel for the defendant that the evidence for the defense, consisting chiefly of the testimony of one Erickson, a police officer, and the four men who at the time were riding in the automobile, is such that the evidence for the plaintiff is thereby overcome. We do not think, however, that

part of the automobile hit him. The also testified that the street car was standing still at the time the door of the street car opened. Then the driver, I understand, did not actually stand up in the front of the street, on the west side of Indiana Avenue, corroborated the testimony of the plaintiff. He testified that he had stopped at 12th street, just before the crash. Then the automobile came and didn't stop, was very close, and the man jumped off there, off of that car, and got knocked down and rolled right about five feet to the curb." He further testified that the automobile was going fast and can not also claim it happened too quick. On cross-examination, he testified that the street car had stopped and the automobile had gone ahead without stopping. As to the position of the street car at the time the plaintiff was injured, the witness testified therein that it was stopped right on the northbound track of 12th street, and stopped there all the time. Then he did not actually see the collision; that when he saw the plaintiff he was lying right close to the street car rolling towards the back end.

It would seem, therefore, that the evidence for the plaintiff, by itself, and if believed by the jury, does quite overwhelmingly show that at the time, the automobile was being driven in violation of the ordinance, and also that the plaintiff was in the exercise of ordinary care. But it is argued by counsel for the defendant that the evidence for the defense, excluding clearly of the testimony of the police officer, and the two men who at the time were riding in the automobile, is such that the evidence for the plaintiff is totally overcome. We do not think, however, that

the evidence for the defendant, as it appears before us in the record, overcomes that which appears to support the contention of the plaintiff. Erickson's testimony is in conflict with the contents of a document which he signed on August 8, 1923. He testified that he was riding on the front end of the car when it stopped on the north side of 19th street; that after it stopped it started up again; that the plaintiff came rushing out and said, "Just a minute, I want to get off at 19th street," and that he, the witness, held his hand out and said, "Don't be in a hurry now, wait a minute, don't jump until the car stops." and that he jumped right under his arm; that the automobile came along and somebody in the automobile pushed the plaintiff and he fell in front of the street car; that he thought the plaintiff jumped before the car stopped, and further that the front end of the street car when the plaintiff jumped was nearly across 19th street; whereas, the document, which he signed on August 8, 1913, which was nearly ten years before the time of the trial, recites the following: "I was on the front platform and wanted to alight at 19th street. When the car was coming to a stop I opened the door and was waiting for the car to stop. I saw that a young man was about to alight and I said to him, 'Look out there, wait until car stops.' He stepped to street, car stopped in about one foot after he had alighted. An auto which was going south and moving slow struck him when he alighted."

The four occupants of the automobile, John and Louis Kuicki and Zitomski and Miezio, the latter being the driver, all testified that the automobile was stopped north of the street car when the street car made its first stop;

The evidence for the defendant, as it appears before us in the record, overwhelmingly and quite supports the contention of the plaintiff. Dickenson's testimony is in particular to the contents of a document which he signed on August 6, 1923. He testified that he was riding on the front seat of the car when it swerved on the sharp turn mentioned; that after it swerved it started up again; that the plaintiff came running out and said, 'That's plenty, I want to get off at 14th street;' and that he, Dr. Gibbons, held his hand out and said, 'Don't be in a hurry one, wait a minute, don't you want the car stopped?' and that he jumped right under his arm; that the automobile came along and somebody in the automobile pushed the plaintiff and he fell in front of the street car; that he thought the plaintiff jumped before his car stopped, and further that his foot and of the street car when the plaintiff jumped was nearly across 14th street; whereon, the document, which he signed on August 6, 1923, which was nearly ten years before the time of the trial, recites the following: "I was on the front platform and walked in night at 14th street. Then the car was slowing to a stop I opened the door and was waiting for the car to stop. I met that a young man was going to alight and I said to him, 'Look out!' He stepped to assist, car stopped in about one foot after he had alighted, as near point was going north and waiting also when he alighted."

The four witnesses of the defendant, John and Louis Dutch and Kennedy and Martin, the latter being the driver, all testified that the automobile was stopped with of the street car when the street car came the first time;

that when the car stopped the automobile stopped ten or fifteen feet north of it, and that after the street car started the automobile started; that when the street car got to the south corner of 19th street, the plaintiff jumped out of the street car. John Kuicki testified that the automobile stopped about eight or ten feet back of the street car, and that when the street car started and the automobile started and was near the head end of the street car, plaintiff jumped out; that at that time the street car was close to the south side of 19th street; that when it started up the second time it was about half way across the street, and the automobile got up to the front platform just as the plaintiff jumped out. Zitomski corroborates the Kuickis, and testified that the automobile stopped back of the street car; that then when the street car started up the automobile went along the side and then the plaintiff stepped off the front platform and ran into the side of the automobile; that he, the witness, had his hand out and shoved the plaintiff, and the latter fell down; that the street car was moving when the plaintiff got off, and that at that time the front end of the street car was in the center of 19th street. Miezio, the driver, testified that he stopped the automobile back of the street car, and that when it started again he started up the automobile; that he then saw the door open and the plaintiff jumped out and ran into the machine; that he tried to avoid the plaintiff and ran the automobile into the curbstone; that the automobile was going about eight miles an hour and the street car at about the same rate.

It would seem, therefore, that the testimony of the

that when the man swerved the automobile stopped too, or (if-
been just north of it, and that when the street car started
the automobile started; that when the street car got to the
south corner of 13th street, the plaintiff jumped out of the
street car. John Smith testified that the automobile stopped
about right or ten feet east of the street car, and that that
the street car started and the automobile started and the man
the back end of the street car, violently jerked out; that at
that time the street car was close to the north side of the
street; that then it started up the avenue when it was about
half way across the street, and the automobile got in ahead
first starting just as the plaintiff jumped out. Edward
corroborates the Smiths, and testified that the automobile
stopped that of the street car; that then when the street
car started up the automobile went along the side and that
the plaintiff stepped off the first platform and was just
the side of the automobile; that he, the witness, had his
back out and showed the plaintiff, and the lights fell down;
that the street car was moving when the plaintiff got off,
and that at that time the front end of the street car was in
the middle of 13th street. Elmer, the driver, testified
that he stopped the automobile back of the street car, and that
when it started again he started up the automobile; that he
was not the door open and the plaintiff jumped out and ran
into the machine; that he tried to avoid the plaintiff and ran
the automobile into the curbstone; that the automobile was going
about eight miles an hour and the street car at about the same
rate.

It would seem, therefore, that the testimony of the

occupants of the automobile is all consistent and to the effect that the automobile did stop ten or more feet back of the street car, but the record discloses a direct conflict as to whether or not the plaintiff got off the street car when it first stopped or after it started up, and in determining that issue the important element is the credibility of the witnesses who testified, a matter the jury, seeing the witnesses themselves, was much better able to determine than we are. In our judgment, after carefully considering all the record, it would not be reasonable to say that the verdict is clearly against the weight of the evidence.

(3) The witness Erickson, on cross-examination, was shown a paper which he admitted he had signed, and which purported to be a report of what had taken place, as far as he saw it, at the time of the accident. It is contended by counsel for the defendant that certain questions were asked Erickson involving the contents of the statement in question which were in the nature of an impeachment, and further were not proper, as the witness had not been allowed to read the statement before he was interrogated. We have examined the record itself and find that the recitation therein of what took place is somewhat confusing. Whether actually the witness was allowedto read it when it was handed to him to identify his signature, does not definitely appear. Further, quite a number of questions were asked him, based, apparently, upon the contents of it, to which no objections were made. Then again, the subject-matter of many of the questions was in the nature of impeachment. On the whole, taking the record as it stands on that subject, the

conducts of the witnesses is all considerations to the effect that the accusation did step two or more feet back of the street car, but the record discloses a direct conflict as to whether or not the plaintiff got off the street car when it first stopped or after it started up, but in determining that issue the important element is the credibility of the witnesses who testified, a matter the jury, having the witnesses themselves, was much better able to determine than we are. In our judgment, after carefully considering all the record, it could not be reasonable to say that the verdict to directly contrary the weight of the evidence.

(3) The ultimate evidence, on cross-examination, was more a matter which in addition to but slight, and which purported to be a record of some one taken down, as far as he saw it, at the time of the accident. It is contended by counsel for the defendant that certain questions were asked Brinson involving the contents of the statement in question which were in the nature of an impeachment, and further were not proper, as the witness did not even attempt to read the statement before in his testimony. He has examined the record with care and find that the cross-examination of this back driver in question, whether actually the witness was intoxicated and if so, if was asked to his to identify his signature, does not satisfactory appear. Further, notice a number of questions were asked him, hence, discretion, upon the contents of it, to which no objections were made. Thus again, the subject-matter of many of the questions was in the nature of impeachment. In the main, taking the record as it stands on this subject, the

confused statement as it is, we do not feel justified in concluding that any substantial error was committed. It is further urged that the examination of Miezio, the driver of the automobile, as to whether or not he was a licensed chauffeur, was objectionable. It was cross-examination, and there could be no reasonable objection to finding out what his status was - whether a licensed chauffeur or not.

(3) It is contended that it was error to give the following instruction:

> "The court instructs the jury that the law did not require of the plaintiff the highest degree of care. All that was required of him was the exercise of ordinary care and what is ordinary care depends upon the circumstances of each particular case and is such care as a person of ordinary prudence and intelligence would exercise under the same or similar circumstances."

The objection made is to the use of the word "similar" in the last line of the instruction, on the ground that it is not the equivalent of the word "like". As the word similar comes through the French from the Latin word "similis", which is defined as "like", the objection is not tenable.

Another instruction is objected to on the ground that it was not entirely based upon the evidence. That objection, also, we find is untenable. As to the contention that the trial judge erred in refusing an instruction based upon the fact that one of the occupants of the automobile may have pushed the plaintiff "thereby proximately causing whatever injury plaintiff received," it is sufficient to say that even if the plaintiff was pushed in some direction by one of the occupants of the automobile, still the proximate cause of the injury to the plaintiff, obviously, grew out of

contested statement as it is, we do not feel justified in concluding that any substantial error was committed. It is further argued that the evaluation of risks, the driver of an automobile, as to whether or not he was a licensed chauffeur, was objectionable. It was cross-examination, and there could be no reasonable objection to finding out what his status was - whether a licensed chauffeur or not.

(3) It is contended that it was error to give the following instruction:

> "The court instructs the jury that the law in its application of the plaintiff's highest degree of care. All that was required of him was the exercise of ordinary care and such is ordinary care depends upon the circumstances of each particular case and is such care as a person of ordinary prudence and intelligence would exercise under the same or similar circumstances."

The objection made is to the use of the word "similar" in the last line of the instruction, on the ground that it is not the equivalent of the word "like". As the word similar comes through the French from the Latin word "similis", which is defined as "like", the objection is not tenable.

Another instruction is objected to on the ground that it was not entirely based upon the evidence. That contention, also, we find is untenable. In the contention that the trial judge erred in refusing to instruction based upon the fact that one of the occupants of the automobile may have pushed the plaintiff "slightly preliminarily causing another injury plaintiff received," it is sufficient to say that even if the plaintiff was pushed in some direction by one of the occupants of the automobile, still the proximate cause of the injury to the plaintiff, undoubtedly, was one of

a situation that came into being and was anterior to the pushing by any one in the automobile.

As to the damages, the doctor who attended the plaintiff the day after the accident, testified that the plaintiff had a fractured collar bone, some bruises about the head, and an oozing from one ear. In answer to a hypothetical question containing substantially what the evidence tended to prove as to plaintiff's injuries, the doctor stated that, in his judgment, the condition of one of the ears of the plaintiff occurred as the result of the accident, producing a fracture at the base of the skull. There being no countervailing evidence on the subject of damages, we are of the opinion that the verdict was not excessive.

Judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

a situation that came into being and was subject to the punishing by any one in the community.

As to this language, the Government attacked the plaintiff's cause of action, contending that the plaintiff had a favoured motor home, some brackets about the road, was so coming from a one way. In answer to a hypothetical question concerning contributing what the evidence tended to prove is to plaintiff's injuries, the Jury stated that, in its judgment, the negligence of one of the cause of the plaintiff's accident was the result of the motorist, producing a fracture on the knee of the adult. There being no conflicting evidence on the subject of damages, we are of the opinion that the verdict was not excessive.

Judgment, therefore, will be affirmed.

O'CONNOR, J. AND TO-WOOD, J. DISSENT.

224 - 28059

(3510)

MANDEL BROTHERS,
a corporation,

Appellee,

v.

WALDES & COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

232 I.A. 321

Opinion filed Dec. 26, 1923.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On January 16, 1922, the plaintiff, Mandel Brothers, a corporation, began an attachment suit against the defendant, Waldes & Company, and caused to be attached certain personal property of the defendant. In the affidavit for attachment the residence of the defendant is stated to be Long Island City in the State of New York. On the same day the plaintiff filed an attachment bond with the clerk of the Municipal Court in the sum of $1100.00. On January 17, 1922, the defendant, having given a forthcoming bond in the sum of $1300.00, the personal property that was attached was returned to the defendant. On February 6, 1922, the defendant filed an affidavit of merits. On April 19, 1922, there was a trial before the court, with a jury, and an instructed verdict, and judgment for the plaintiff in the sum of $513.92. From that judgment the defendant appeals.

The question in the case is whether the terms of a certain written contract of April 26, 1921, were carried out by the plaintiff. The contract is made up of a

No. - 12256

MARION BROTHERS,
a corporation,

Appellant,

v.

BALDUS & POLLIT,
a corporation,

Respondent.

APPEAL FROM
MUNICIPAL COURT
OF APPEALS.

Decision filed Dec. 16, 1924.

An action against a corporation to recover for
repairs of the boiler.

On January 24, 1923, the appellant, Marion
Brothers, a corporation, began an action against the
respondent, Baldus & Pollit, to recover the amount
of a certain personal property tax paid by the plaintiff.
In the alleged
the defendant
agreed to be liable for the tax paid by the plaintiff.
On the ground that the plaintiff filed a counterclaim
the amount of the building owned by the one of Ellis.
On January 21, 1923, the defendant, having owned a
building and in the use of Ellis, the property
that was damaged was repaired by the defendant. On
March 6, 1923, the defendant filed a criminal of
On April 14, 1923, there was a trial before the court, with
a jury, and the defendant testified, and judgment for the
plaintiff in the sum of $[illegible]. From that judgment the
defendant appeals.

The question in the case is whether the terms
of a certain building contract of July 20, 1923, were
ried out by the plaintiff. The contract is made up of a

written proposition by the plaintiff, directed to the defendant, which was subsequently accepted by the defendant. The words in the contract that are important are as follows:

> "Confirming verbal conversations had with your Mr. J. Waldes this day, we agree hereby to request manufacturers by letter to provide dresses, waists, etc., used by us with KOH -I-NOOR dress fasteners, and further agree to place upon all orders from us to such manufacturers a sticker which you are to furnish us gratis reading 'Use Koh-i-noor Fasteners.'
>
> We further agree to advertise the fact, when in our discretion we deem it advisable to do so, that dresses and waists handled by us are equipped with KOH-I-NOOR FASTENERS.
>
> In consideration of our doing the above you hereby agree to pay to us, beginning the first day of July, 1921, the sum of One Hundred ($100.00) Dollars in monthly installments," etc.

The contract provides that the defendant shall pay the plaintiff $600.00 in 1921, $1800.00 in 1922 and $2400.00 in 1923,-all in monthly installments- and,also, provides that while the contract is in force the defendant will furnish Koh-i-noor fasteners "to meet any demand created by virtue of this agreement," and, further, that the plaintiff will"furnish the names of manufacturers from whom" they"order merchandise during the life of this agreement."

It also contains certain provisions in regard to the defendant holding the plaintiff harmless against any claims and certain actions which might be brought or entered against them in suits at law or equity because of any infringement of the patent on the fasteners.

It is contended on behalf of the defendant that the plaintiff failed to prove who the manufacturers of dresses and waists, that he dealt with, were, and failed to show that

written approval in by the plaintiff, directed to the defendant, which was subsequently accepted by the defendant. The work in the material part was completed as follows:

> "Continuing report correspondence and with your Mr. J. Pilden this day, we agree hereby to replace manufactures by Indsor in service (Jaguar, Wolsley, etc.) used by us at the 400 - 500 Home Treatment, and further agree to place upon all orders from us to such manufacturer a stamp which you are to furnish us yearly reading 'Use Sub-Heater Treatment.'
>
> We further agree to advertise the fact, when in our discretion we deem it advisable to do so, that Jaguar and Wolsley Heaters by us are equipped with air-1-Sub Heaters.
>
> In consideration of our doing the above you hereby agree to pay to us, beginning the first day of July, 1927, the sum of one hundred (100.00) dollars in monthly instalments, etc.

The contract provides that the defendant shall pay the plaintiff $400.00 in cash, $100.00 in 1926 and $500.00 in 1928, all in monthly instalments. Moreover, provides that while the contract is in force the defendant will furnish Sub-Heater Heaters in such as may be owned, operated by virtue of this agreement, and, further, that the plaintiff will furnish the owner of manufacturer from whom they are manufactured during the life of this agreement.

It also contains another stipulation in regard to the defendant relying the plaintiff harmless against any claims and actions which might be brought or taken against them on account of the failure of the parties on the Heaters.

It is contended on behalf of the defendant that the plaintiff failed to live up to the manufacturer of Heaters and which, they be could with, and, failed to show that

letters requesting them to use the particular fasteners had been sent to them.

The evidence shows that at the outset as a matter of convenience it was agreed between the parties that the plaintiff might use a rubber stamp instead of a sticker and that, accordingly, a stamp was prepared containing the following: "Waldes. Koh-I-Noor Triumph Fasteners. Kindly use Koh-I-Noor Fasteners on all garments of this order. Mandel Brothers."

One Newman, merchandise manager for Mandel Brothers, testified that he instructed Miss Klug to use the stamp on every order that was sent to the different manufacturers; that several million dollars worth of dresses, etc. passed through his office; that he saw some of the orders stamped with the rubber stamp by Miss Klug in his office; that he gave out a list of names of manufacturers to Mr. Weber, representative of Waldes & Company; that he saw probably 200 orders stamped; that he could not give the exact amount of orders that were passed through his office after April 26, 1921; that they probably varied from 50 to 100 a day; that he asked Miss Klug a number of times if she was stamping the orders and she said she was; that her desk was near his and he could see her do it; that his office , Miss Tarson's, and the office in New York are the places through which all orders for dresses and waists for Mandel Brothers pass.

Miss Klug, a clerk to Newman for Mandel Brothers, testified that she placed the stamp on all orders that came to Newman's office going to dress manufacturers; that the orders were sent up by the buyers to the 14th floor; that she showed

Jackson requesting them to use the particular instrument had been sent to them.

The witness again then as the cross-examiner in a matter of conversation it was agreed between the parties that the plaintiff might use a number which Jackson had at a minimum and that, accordingly, a check the printed conditions the Lightning "Tailors. Left-Hour Trench Dispatch. Clearly the Left-Hour Instrument on all matters of this order, sound instead."

The Jackson, cross-examine counsel for second defendant, testified that he instructed Miss King to use the phrase on every order that was sent to the different manufacturers; that several million dollars worth of business, and, because through his office; that is the cause of the reason because why the rubber stamp by Miss King in his office; that he also had a list of names of manufacturers in it. Then, representatives of Jackson's department that he was actually the orders subsequently that he would not give the exact number of orders that were passed through his office after April 24, 1941; that they probably mailed them. It is in a day; that he stated that they a number of times if the was changing the orders and the said the rest; that her desk was same his and he could see her in it; that was office , Miss Lawson's, and the office in New York was the place through which all orders for Jackson was mailed for Jackson Jackson plan.

Miss King, a clerk to Jackson for second defendant, testified that she placed the stamp on all orders that came to Jackson's office going to three manufacturers; that the orders were sent by her by the regular in the line Jackson; that she stamped

them to Newman; that Newman then O.K.'d them and she stamped every one of them.

Miss Fisher, assistant buyer at Mandel Brothers, testified that they had a rubber stamp in the office and that as the orders were made out they were stamped by her.

One Batterton, resident buyer of Mandel Brothers, through a deposition, testified that he placed or caused the stamp to be placed on all orders going out of his department.

One Richner, by deposition, testified that he was an assistant in the office of Mandel Brothers in New York and that he stamped all orders sent out to manufacturers of ladies' garments with the Koh-I-Noor stamp; that Batterton told him to place the Koh-I-Noor stamp on all the orders.

As to the list of names of manufacturers, Newman testified that he gave a list of manufacturers, from which the plaintiff ordered merchandise, to Weber, representative of the defendant; that it was made up by Miss Loll in the dress department shortly after the contract was agreed upon.

One Wille, assistant to the comptroller in Mandel Brothers testified that he was instructed to mail out certain letters to various manufacturers; that he obtained the names of the manufacturers from Newman and mailed out the letters; that a copy of the letters is as follows: "For some time past we have been selling Koh-I-Noor fasteners over our retail counters and have also specified them to be used on garments manufactured for us. This is to request that until further

then to inform that famous firm G.E.C. that we are the
stamped very one of them.

Blue Fisher, realizing hours of doubt drainers,
testified that they had a product among in the office and
that as the orders were made out they were stamped by her.

The Defendants, realizing hours of doubt drainers,
through a deputation, insisted that he attend on behalf
the group to be stamped on all orders among lot of his de-
partment.

Due Blanco, by insinuation, testified that he was
an assistant in the office of Sudhir Building in the loop
and that he stamped all orders sent out to manufacturers of
Indian' pyramids with the Sub-1-Door stamp; that Defendants
told him to place the Sub-1-Door stamp on all the machines.

In to the list of names of manufacturers, Jerome
testified that he gave a list of manufacturers,from which the
plaintiff selected merchandise, to Fisher, representative of the
defendant; that it was made up in the full in the Jerome De-
partment shortly after the contract was signed upon.

Due Vilin, assistant to the purchaser in Sudhir
Business testified that he was instructed to mail out catalog
letters to various manufacturers; that he obtained the names
of the manufacturers from Jerome and called out the letters;
that a copy of the letters is as follows: "We come also
just to have been all ing Sub-1-Door Dataserve over our retail
monthly and have also specified that to be used on pyramids
manufactured for us. This is to request that until further

notice you provide all material for us with Koh-I-Noor fasteners. Should you for any reason prefer some other make we would like to have you communicate the fact to us intimating your reasons therefor."; that among the names of the manufacturers on the list to whom he sent letters were the Carlo Waiste Co., Kurzrach Brothers and Stein & Weiss. On cross-examination he testified that he did not know when those letters went out nor to how many people; that he simply filled in the names and addresses; that the list was given to him; that he filled in the names on the typewriter in accordance with the list which was given him.

The witness Loll testified that in the early part of 1921 she was requested to make up a list of manufacturers of dresses and waists who used the fasteners and that she did so and gave it to Newman.

One Anderson testified that there were no letters sent out to manufacturers by the New York office; that in the orders that went out of his office he enclosed as one of the items the specification and requirement that Koh-I-Noor fasteners be used and used the stamp on their official confirmations; that none of thosemanufacturers ever wrote to him in regard to the use of the fasteners.

On behalf of the defendant one Weber, local manager of the defendant, testified that he saw Newman of the plaintiff corporation and asked the reason why manufacturers were not using Koh-I-Noor fasteners; that Newman said the plaintiff was doing its part in putting stamps on orders; that he, the witness then said, it is not doing any good, to which Newman answered, "That depends on salesmanship. You should go around and

notice you provide all material for us with Lon-I-Sonn
Enterprises. Should you for any reason prefer some other
name we would like to have you acknowledge the fact so
we instructing your remarks accordingly." that among the
names of the manufacturers in the list to which he sent
letters were the Waite Sales Co., Internal Products and Lisle
& Tuin. In order-translation to translated this to his
not know that those letters were not sent to the only people;
that he simply filled in the names and addresses; that the
list was given to him; that he filled in addresses on the
typewriter in accordance with the list which was given him.

The witness Lori testified that in the early
part of 1963 she was requested to make up a list of manu-
facturers of dresses and stated she used the Internet and
that she did so and gave it to Kenner.

The Attorney General then asked Mr. Lori why he
put to manufacturers in the New York City area. Mr. Lori
that most of her files in Montana so she in the time the
specification and recollected that Lon-I-Sonn Enterprises
and was the etape on their efforts continuing. Mr. Lori
of manufacturers was right to his in regard to the use of
the Internet.

On behalf of the defendants one Taber, Lori manager
at the Internet, testified that he was aware of the quality
operation and stated the reason why manufacturers were not us-
ing Lon-I-Sonn Enterprises; that Kenner said the principle was
being in part in putting always on points; that he, the wit-
ness then said, is it not doing any good, to which Kenner
noted, "that depends on situation." Tom stated in answer one

talk to these people."

There was offered in evidence a letter dated November 1, 1931, purporting to be signed by the company by George Gallow, the advertising manager of the defendant. In that letter it is stated that the plaintiff has lived up to its agreement and that the defendant has no complaint to make on that score, but complaint is made that none of the garment manufacturers are complying with the plaintiff's request to use the Koh-i-Noor fasteners. Further, in that letter the plaintiff is requested to insist in a few cases that the Koh-I-Noor fastener be used on the garments of the manufacturer, and at the close of the letter, after intimating that the defendant was getting nothing out of the contract, the following language is used: "The main object for writing you this letter is to find out whether you are willing to insist in a few instances that Koh-I-Noor be used on your garments, and whether you could make any suggestions that will help us to obtain for you Koh-I-Noor on all the readytowear which you buy which as you know is the object of our agreement and the result we are both eager to obtain." Also, it was admitted by Waldes, the president of the defendant company, that Gallow, who signed that letter, was employed by the defendant as advertising manager in New York. It was testified to by Waldes that Gallow was not authorized to write letters with regard to advertising contracts made for the benefit of Waldes & Company.

We think it appears quite obviously that the evidence sufficiently shows that the plaintiff had fulfilled its part of thecontract in question. It shows that the plaintiff did request manufacturers by letter to provide Koh-I-Noor dress

bill to these results."

There was effort in attempt a letter dated November 1, 1911, purporting to be signed by the company by George Dillon, the advertising manager of the enterprise. In that letter it is stated that the plaintiff was lured on to the experiment and that the defendants had no complaint to make on that score, but neverthless it was that one of the lowest misrepresentations for producing with the plaintiff's consent to use the 100-1-door Instrument. Further, in that letter the plaintiff is represented in letter to a few cases that the 100-1-door Instrument be used on the premises of the manufacturer, and at the close of the letter, after intimating that the defendant was getting nothing out of the business, the following language is used: "You will object for making you this letter in to find out whether you are willing to insist in a few instances that 100-1-door be used on your premises, and whether you would make any concessions this will help us to obtain for you 100-1-door on all the engravers which you buy which is for you in the object of our agreement and the results we are both happy to obtain." Also, in our affidavit by Dillon, the president of the defendant company, that which, who signed that letter, was employed by the defendant as advertising manager in New York. It was testified to by Dillon that Dillon was not authorized to write letters with regard to advertising contracts with the firm lawsuits of Dillon & Company.

To which is answer which adversely that the defendants modifications above that the plaintiff had fulfilled its part of contribution in question. It shows that the plaintiff did request manufacturers by letter to provide 100-1-door Instruments

fasteners; that it did place upon all its orders to such manufacturers a stamp, which it was agreed should be used in place of a sticker, which stamp read "Use Koh-I-Noor Fasteners," and that it mailed to the defendant a list of names of some manufacturers with whom it had placed certain orders. Of course, the obligation to advertise was left entirely to the discretion of the plaintiff.

The evidence introduced on behalf of the plaintiff was not seriously controverted by any evidence on the part of the defendant. It is argued on behalf of the defendant that it was not sufficiently shown who the manufacturers of dresses and waists were. In view of the fact, however, that there was testimony that letters were actually sent to the manufacturers it was not necessary for the plaintiff to go further in order to make out its case.

The important elements of the contract as far as the defendant is concerned were that the plaintiff should request the manufacturers by letter to use the particular fasteners and that the plaintiff would stamp upon all their orders sent to the manufacturers the words, "Use Koh-I-Noor Fasteners." The evidence shows that the plaintiff fulfilled those obligations. That, of course, was sufficient and made out a prima facie case. Further, the letter signed by Gallow, is additional evidence that the plaintiff carried out its part of the contract. Counsel for the defendant argues that that letter was not competent. With that, however, we do not agree.

Under the circumstances, we are of the opinion that the trial judge was fully justified in instructing the jury at the close of all the evidence to bring in a verdict

Referencing that is did place upon all the events to such constructions a stamp, which it was agreed should be used in place of a signature, which stamp read "The Rule-Book Referees," and that it should be used to delineate a list of cases of such constructions with whom is the phrase Patrick Ordoom. Of course, the originals is otherwise not left entirely to the imagination of the reader.

The evidence introduced on behalf of the plaintiff was not seriously controverted in any evidence on the part of the defendant. It is argued on behalf of the defendant that it was not sufficiently shown who the constructions of dressed and whence came. In view of the fact, however, that Stone and Sullivan had letters from officially and in the constructions it was not necessary for the plaintiff to go further in order to make out his case.

The important element of the contract is for as the defendant is concerned was that the plaintiff should be paid for constructions in letters to the Rule-Book Referees and that the plaintiff should be paid. Nothing came of to the constructions but only, "The Rule-Book Referees." The evidence shows that the plaintiff furnished those constructions. That, of course, was sufficient for the plaintiff to make a prima facie case. Further, the letter signed by Sullivan, in addition evidence that the plaintiff furnished the letter part of the contract. Counsel for defendant argues that that letter was not accepted. This fact, however, is in his favor.

Under the circumstances, my view of the judgment that Judge was fully justified in interpreting the letter as the sense of all the evidence as being in a receipt.

for the plaintiff.

The judgment will, therefore, be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

(3511a)

345 - 28080

GUSTAVE REHFELDT,

Appellee,

v.

A. W. MEYER,

Appellant.

APPEAL FROM,
CIRCUIT COURT,
COOK COUNTY.

232 I.A. 321

Opinion filed Dec. 26, 1923.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Rehfeldt, having been injured, while riding a bicycle, by a collision with an automobile driven by the defendant, Meyer, brought suit against the latter and recovered a verdict and judgment in the sum of $700.00. This appeal is from that judgment. The declaration contains seven counts; the first three charge negligence by the defendant in the operation of his automobile; the fourth was withdrawn during the trial; the fifth count charges that the defendant operated the automobile in a closely built up part of Barrington negligently and at a speed in excess of ten miles per hour contrary to the laws of the State; the sixth count charges that the defendant negligently operated his automobile at a speed in excess of fifteen miles per hour contrary to the laws of this state; the seventh count charges that the defendant negligently operated his automobile around a corner or curve in the highway in excess of six miles per hour contrary to the laws of the State. The defendant pleaded the general issue.

Opinion filed Dec. 26, 1922.

The collision occurred in the village of Barrington, the main street of which, running east and west, is the dividing line between Cook and Lake County, Illinois. Main Street, 66 feet from building line to building line, runs east and west through the village. Cook street and Williams street, both running north and south, come together at the middle line of Main street, one being a continuation of the other. The Chicago and Northwestern Railway with two tracks, runs northwasterly and southeasterly, crossing Main street at an angle of about 45°. Parallel with the right of way of the railroad is Railroad street which extends southeasterly from the south line of Main street. Between the west line of Cook and Williams streets, running north and south, and the south line of Main street and the northeast line of Railroad street, is a small triangular piece of ground 26 by 36 by 45 feet, known as a public park. On the south side of Main street there is a cement walk, which is a cross-walk, running east and west which marks the meeting of Main street on the south and Railroad street on the northwest. Railroad street is 45 feet in width but, as it strikes Main street at an angle, the cement cross-walk on the south side of Main street, which crosses Railroad street, is 80 feet long. The collision took place on the cross-walk or near it on Main street or on Railroad street near or about where those two streets joins

The plaintiff had a shop on the north side of Main street east of the railroad tracks. The defendant had a store at the northeast corner of Walnut and Main streets, in the neighborhood of 300 feet west of where the collision took place.

It is the theory of the plaintiff that while riding

The building concerned is the village of Bartlett, the only street of which, running east and west, is the dividing line between Cook and Dupage County, Illinois. Main Street, or Iowa Road Building line is building line, runs east and west through the village. Cook street and William street, both running north and south, cross together at the middle line of Main street, one being a continuation of the other. The Chicago and Northwestern Railway with two tracks, runs northeastly and southwestly, crossing Main street at an angle of about 45°. Bordering upon the right of way of the railroad is Railroad street right outside southeastly from the south line of Main street. Between the west line of Cook and William streets, running north and south, and the south line of Main street and the northeast line of Railroad street, is a small triangular piece of ground 22 by 32 by 40 feet, known as a public park. On the south side of Main street there is a grocery store, which is a frame-work, resembling what has not quite been worth the wrecking of brick stores on the north and Railroad street on the northeast. Railroad street is 42 feet in width but, as it crosses Main street at an angle, the south cross-walk on the south side of Main street, which crosses Railroad street, is 80 feet long. The building that is place on the cross-walk or near it on Main street or on Railroad street just or close where these two streets joins

The injunction had a shop on the south side of Main street east of the railroad tracks. The structure had a frame at the northwest corner of Main and Main streets, in the neighborhood of 300 feet west of where the building was place.

It is the theory of the injunction that while trains

his bicycle east across the junction of Main street and Railroad street going to his shop the defendant drove his automobile in a curve southeasterly, around from Main street into Railroad street negligently and at an excessive rate of speed and struck one of the wheels of the bicycle throwing the plaintiff to the ground and breaking his left arm. On the other hand, it is the theory of the defendant that instead of the defendant's automobile striking the plaintiff it was the side of the automobile and the front wheel of the plaintiff's bicycle which came into contact and that the automobile did not strike the bicycle; that it was the plaintiff who ran into the right rear mud guard on the defendant's automobile and so was thrown off his bicycle and injured, and that the verdict is against the manifest weight of the evidence.

The evidence shows substantially the following: The plaintiff was a man 53 years old, a cobler, who had lived in Barrington over ten years, and had known the defendant during all that time. He had a shop on the north side of Main street south of the railroad tracks. The defendant, who was the president of the village of Barrington, had a store on the northeast corner of Walnut and Main streets about 200 feet west of the triangular park and on the day in question started with his automobile to drive to Chicago. The plaintiff shortly after noon on May 26, 1919, rode on a bicycle around from Hough street, east on the south side of Main street intending to go to his shop across the tracks on that street. After he reached Railroad street, where it joined Main street, and while crossing over on the west side of Main street where it joins with Railroad street, the automobile and the bicycle collided and the plaintiff was thrown down and his left arm fractured. The plaintiff testi-

his enquiries could assure the protection of this object and mili-
tant street going to his aid; the Attendant drove his auto-
mobile in a more multidirectively, escaped from his street into
Malcolm street multiplexily and as he approaches more of sound
and stands one of the shacks at the Lafayette Wrecking and Gain-
ing to the Jewish and remaining his left rear. In the event
Bond, if to the theory of the individual that lumbered at the
Internal's automobile disturbing the plaintiff is not the
side of the automobile and the front wheel of the plaintiff's
bicycle which came into contact and the automobile did
not strike the bicycle; that it was the plaintiff who was
the right rear and speed in the Internal's automobile and
he was blown off his bicycle the injuries that the defen-
dant is against the medical relief of the evidence.

The evidence shows substantially the following: The
plaintiff was a lad 12 years old, a cobbler, who had lived
in Morrisania over the years, in the house in which
during all that time. He had a shop on the north side of
Bell street near of the railroad tracks. The defendant,
was the proprietor of the village of Morrisania, has a
place on the southeast corner of Bedford and Morrisania
streets. The fact that of the Morrisania park and on the day
in question adjoined with its automobile in front of Gilmore.
The plaintiff shortly after noon on the 18, 1921, rode on a
bicycle across from Bedford street, east on the south side of
Bell street intending to go on his shop across the Bronx
in that street. After he reached Bedford street, there is
Bedford Park street, and while according over on the west side
of such street there is joins with Morrisania street, the
automobile and the bicycle collided and the plaintiff was
thrown down and his left was fractured. The plaintiff testi-

fied that he was riding at about seven or eight miles an hour and that the automobile was traveling about twenty miles an hour, and that when the automobile and bicycle came together the bicycle was on Main street; also, that the automobile was driven around in front of him onto Railroad street and that it hit the front tire of his bicycle and threw him off; and that the automobile had given no signal. On cross-examination he stated that he did not see the defendant's automobile until after he was struck; that the place where the automobile was when it struck him was a little in front of the triangular flower bed or park; that when he fell his bicycle was lying on Main street; that it must have been the center of the automobile or the running board that struck him; that at the time of crossing Railroad street everything was clear as he went ahead; that the automobile came from behind him and cut him off and the front wheel of the bicycle and the automobile came together; that at that time he was not on the sidewalk that ran across between Main street and Railroad street; that he was on Main street from one to three feet off the cross walk; that he did not have time to turn his front wheel either way to avoid the collision; that he was going straight east on his bicycle and the defendant came from behind him and cut him off and his bicycle turned to the left when he fell; that at the time he did not see any automobiles on the south side of Main street or on the south side of Railroad street. He further testified that he had weak eyes in 1919; that he had been using glasses and was wearing them at the time of the accident but that he could see all right.

The evidence of the defendant, Meyer, is to the effect that when he started out from his house in his auto-

mobile he saw the plaintiff coming down Hough street; that he, Meyer, drove his automobile east on Main street and then turned southeast into railroad street; that he did not see the plaintiff again until a passenger in his automobile called his attention to the fact that the plaintiff had been hurt; that when he turned southeast into Railroad street he looked ahead to see if everything was clear; that it was about noon and the street was clear; that when his attention was called to the plaintiff having fallen off his bicycle he stopped and got out of his automobile and went back to him; that when he reached him the bicycle was lying on the south side of the cross walk near the corner of the triangle; that when he asked the plaintiff what was the matter the latter said, "Meyer what do you want to run over me for?" and that he himself responded, "Where in the world was you that I could run over you." On cross-examination he testified that he started in low speed, shifted to second and then into third, which was the highest speed, and was going from eight to ten miles an hour just before he stopped; that his automobile was in high speed when he turned on Railroad street; that seeing nothing in the way he gave no signal; that it is his opinion there were two or three vehicles standing in front of the stores on the south side of Railroad street; that when he got on Railroad street he was about ten or twelve feet or a little more from the triangle a little north of the center of Railroad street; that he did not know that his automobile had struck the plaintiff. On redirect examination he stated that the automobiles on the south side of Railroad street were headed towards the walk and were all Fords.

ambile to see the plaintiff leaning down towards artemis; that he, Agyro, drive his automobile away so his account can then without evidence that artemis already had in his arms the plaintiff again until a minutes to his automobile called his attention to the fact that the plaintiff had been hurt; therefore he turned accident into artemis street he looked about to see if everything was clear; that it was clear and the street was clear; that when his attention was called to the plaintiff having fallen off his bicycle he stopped and got out of his automobile so, that when he did, they then he recognized the minority was lying on the south side of the street with over the street of the bicycle; that when he asked the plaintiff what was the matter the injured said, "Agyro what do you want to run over me for?" and that he then said responded, "Where is the hurt you, that I didn't run over you." An cross-examination of plaintiff that he plaintiff in the speed, subject to speed and then lane driving, which was the highway speed, and was going from south to the side on over just before he stopped that the automobile was in high speed when he turned on horizontal street; this testimony nothing in the day he gave an signal that is in the middle, where was the or turns movement evidence in front of his street on the south side of horizontal street; that when he got in horizontal street to the speed he was in a little more from the middle a little south of the center of horizontal street; that in fact that his automobile had struck the plaintiff. An cross-examination by counsel that the automobile on the south side of horizontal street was heard towards the left and were all torn.

One Ackerman, who was in the barber shop, which faced the triangular park testified that he saw the plaintiff fall from the bicycle and had just a glimpse of an automobile going up Railroad street; that he could not tell how fast it was going; that he could not tell whether the bicycle was ahead of the automobile or behind it. He further testified that there were no automobiles parked in front of the barber shop and that the place where the plaintiff fell was right at the end of the triangle; that the bicycle was lying on the cross walk which was practically level with the street itself.

The evidence of one Lageschulte is that while standing in the door of the barber shop he saw the plaintiff on his bicycle and the defendant in his automobile coming down Main street; that the automobile was in the middle of Main street turning to go southeast on Railroad street; that he next observed the plaintiff "turned off from the sidewalk a trifle," the sidewalk is a little higher in the center and it is rounding and "Mr. Rehfeldt got off from the sidewalk right to the very edge". "The south edge"; and then "Mr. Meyer turned - when Mr. Meyer turned on Railroad street Mr. Rehfeldt turned to the left to go onto the crossing again, and when he did that he struck the rear part of Mr. Meyer's fender, it was just a slight touch but it was enough to throw the front wheel of his bicycle off"; that it was the rear end of the fender of the right hand rear wheel; that the bicycle wheel was turned to the right and the plaintiff thrown to the left and the bicycle fell on the cross walk on Main street. On cross-examination he testified that the plaintiff and defendant were both about abreast of

Our ancestors, who are in the Garden then, which
found the strangulation with tentacles that he was his
placidly full from the bicycle not far just a glimpse
of an automobile going on Sullivan Street. That he could
not tell how much it was going then he would not tell
whether the strange man among of the automobile or Sabina
is. He further ascertained that there was no resemblance
perhaps in front of the number they not that the plain
short the Palmetto Club was right at his not of his sign-
ming; that the people was lying in the tension with which
was practically lured with the street itself.

The sadness of the experiment is that with
something in the back of the mirror that he has the disin-
tegration of the bicycle and the tentacles is the consciously man-
ing from this street; that the mechanical is not in the sadness
of this where towards to be mechanical in solution except
that he work changes the practical theory not this man
whether is trying." The dynamic is a little light in the
center and it is so crowding and "Mr. Sullivan" not off from his
although right in the very night". "The street shortly the
time "Mr." never turned - this is. Never through on Sullivan
street in. Instead through to not tried to go down the street
long night, but then he did that he change the time back of
in. Never finding, if he just a light which but it was
enough to turn his front chair of the Sullivan city that
is was the over and of the tension of the night head over
night; then the strange man in front of the night and
the Sullivan change of the late and the strange city in the
street said he not street. The transformation in reality
that the Palmetto and disappear city. Look about somewhere of

each other when Mr. Meyer turned down Railroad street; that the automobile was going about eight miles an hour; that he did not hear any signals of any kind.

One Smith, a barber testified that he saw from the door of his barber shop, which was about forty to fifty feet from the place where the collision occurred, on Railroad street, the plaintiff and the defendant, the one on his bicycle and the other in his automobile, on Main street; that he saw the automobile going across the crosswalk from Main street into Railroad street; that he saw the plaintiff fall with his bicycle on the crosswalk; that he had just been riding along at a slow gait of five or six miles an hour; that he saw the plaintiff turn his front wheel in order to miss the automobile; that then he fell; that his front wheel turned to the left, that is towards the north. When asked, "Did the bicycle come in contact with the automobile? he answered, "Well I wouldn't say the bicycle hit the machine the machine had passed it when it fell". And when asked, "Was the bicycle pulled or deflected from its course in any way by the machine?" he answered, "No I wouldn't say the machine pulled or dragged any at all, he fell to his left". And when asked what caused him to fall if he knew, he answered" I can't say that the car made him fall, the way he turned the front wheel around, I think that would have thrown him off the wheel." On cross-examination he stated that when he first saw the plaintiff he was a little west of the center line of Railroad street on the crosswalk and the automobile a little east of the center line of Railroad street. When asked if he had not told the plaintiff some days after the collision that he, the plaintiff,

each other then so, which proves that Sullivan answer, that the accessories are going where angry drive in every that be did not have any slight of my place.

Now Smith, a another testimony this is not from the door of his house only, while one about there on trying that time the place where the collision occurred, he without where, the manager and the conductor, the not on the engine and the order in his locomotive, he this street that it was the automobile going across the crossing from plain street then followed street; that is not the plaintiff fell with his bicycle on the crossing that he had been riding along at a slow pace of time on his side on front, that he saw the plaintiff turn his front wheel in order to allow the locomotive; that then he fell; that the front wheel turned to the left, that in turning the wheel. Then again, "If the bicycle was in contact with the locomotive?" he answered, "Well I wouldn't say the bicycle did not touch the engine it when it fell". And then again, "Was the bicycle pulled or deflected from its course in any way by the collision?" he answered, "No I wouldn't say the collision pulled or changed my at all, he fell to his left". And then asked what caused him to fall if no blow, he answered I don't say that the car made him fall, the car he turned the front wheel around, I think that would have thrown him off the wheel." On cross-examination he stated that when he first saw the plaintiff he was a little east of the centre line of railroad track on the crossing and he proceeded a little more to the center line of railroad street. Then again if he had not put the plaintiff down days after the collision that he, the plaintiff,

ran into the automobile, the witness answered, "I told him then that he had run into Meyer that if the machine hit him, that he had run into Meyer, that is the only way I could see it." And he further stated that he could not say whether the bicycle hit the automobile or missed it; that it may have been the turning of the wheel by the plaintiff that threw him; that he was not able to say that the automobile was struck or whether the bicycle was struck "but when he fell Meyer was past, apparently past him."

The evidence of one Dockery, a young man eighteen years of age at the time of the occurrence in question who was walking east on Main street near the corner of that street, is to the effect that at the time the plaintiff on his bicycle was on the crosswalk the automobile was going southeast on Railroad street; that from where he was he could not tell whether the automobile and the bicycle touched each other; that he was on the right hand side and the bicycle was between him and the automobile; that the right back wheel of the automobile was the nearest part to the front wheel of the bicycle when the bicycle fell; that he did not remember whether there were any cars parked on Railroad street; that he did not see any other automobiles and no other bicycles than the plaintiff's and the defendant's.

The evidence of one Amelia Frick is to the effect that she was in the automobile at the time, sitting in the back seat; that she saw the plaintiff on his bicycle several feet from the automobile, riding east on the south side of Main street; that after the automobile had turned onto Railroad street she happened to look around through the back glass of

can take the automobile, the witness replied, "I told him he had been in and he said he would stopp that if the machine did him, that he did not care longer, that it did only say I could see it." Did he further ordered that he not a was any whether the bicycle his the automobile or answer by that it by some even the warning of the wheel by the driver said that there is not not able to say but the automobile was attempt or during the illegal the driver "But when he full lower was part, unnecessarily over him."

The evidence of one Jennings, a young man eighteen years of age at the time of the occurrence is somewhat the most striking part of their argument over the manner of that accident. In other, either that at the time the bicycle was in the automobile was going backward or that the driver of the bicycle turned back when he saw the automobile and the bicycle rounded and the bicycle was between the and the automobile; that the right back wheel of the automobile was the bicycle; that at the first wheel of the bicycle when the bicycle fell; that he was standing whether there was any horse behind or without warning; that he did not see any other automobiles and no other bicycles when the collision and the accident.

The evidence of one Smith tends to be to the effect that she was in the automobile at the time, sitting in between Mary; that she saw the collision of the bicycle between first from the automobile, nothing went up the south side of this street; that after the automobile had passed there were twelve people supposed to have passed through the back place of

the automobile and saw the plaintiff lying in the dust; that she did not know whether he was at Railroad street or at Main street; that she did not observe any jar of the machine; that she noticed the plaintiff as the automobile was turning southeast; that he was riding east on the right side of the automobile, a little back of it; that it seemed as though he was going around the automobile; that the automobile was going about eight miles an hour; that when she first saw him he was on the walk and she bowed to him; that he was then about half of the way across the crossing which separates Main street from Railroad street.

The witness Halverson testified that he saw the plaintiff coming up Main street and the defendant turn in ahead of him; that after the collision he went to help the plaintiff and when he got there the plaintiff and his bicycle were in the middle of the crosswalk about half way between the triangular park and the other side of Railroad street.

The witness Babcock, a daughter of the plaintiff, testified that the day after the collision the defendant called at her father's house and in the course of a conversation in which her father, the plaintiff, asked the defendant, "Why did you cross over?" the defendant said, "Well I thought I could make it."

The defendant offered in evidence Section 1 of Chapter 6 of the Ordinances of the Village of Barrington, which provides that no person shall ride a bicycle on any of the sidewalks or footways of the Village of Barrington.

The automobile and now the airplane have in the most; when we fly our own planes, we are fastened down or at fastened around or at work around, then we all are moving up, yet in the meantime, we are moving the statistic in the laboratory we treated mechanical. That is the moving and we are right side of our automobile, a little work of fly. Now it seems as though in our going around we commonly, then the time mobile has gone down flight while it hover, that then our time who the man or the mail and the hover to fly, this is the time about half of the by answer the mechanic which accounts that where few believed stress.

The stress between practice that is now the physicist moving or well where and the statistic this is about of fly, then after the mechanic to get to fly the statistic and then to get from the statistic and the physics then in the state of an commonly then fly and between the airplane just and the where this is mechanic above.

The "Wright Brothers" a daughter of the statistic, understand that the day after the mechanic the mechanic noted at her Orphan's home and in the house of a newspaper in which has fallen, the statistic, said the reporter, "Why did you stay home?" the reporter said, "Well I thought I would see it."

The mechanic stress to achieve lacking a of improve a or the consequence of the village or airplane, which pre-vide that an house small size a depends on fly or in the stan-ding be fighting of the flight of mechanic.

It appears from the evidence in the case that the defendant was driving from Main street into Railroad street and undertook to drive around ahead of the plaintiff, and that the automobile at the time it crossed the crosswalk between Main street and Railroad street was east of the center of Railroad street and, just before the collision, was slightly east of the plaintiff on his bicycle. It is admitted by the defendant that when he started out from his house he saw the plaintiff riding his bicycle north on Hough street, and the defendant testified that he did not again see the plaintiff until sometime after the plaintiff was injured. That is difficult to understand inasmuch as the evidence overwhelmingly shows that the defendant and the plaintiff were both traveling east parallel to each other on Main street, and, apparently, never far apart. If the jury believed the testimony of the plaintiff, they may well have concluded that the defendant was guilty of carelessness and negligence when he drove around in a southeasterly direction from Main street into Railroad street east of the center line of Railroad street and undertook to cross in front of the plaintiff on his bicycle. The plaintiff, whether on the crossing itself or on Main street or Railroad street, was entitled to be where he was, and as he was traveling east and the defendant was driving so as to turn from Main street into Railroad street, it behooved the latter to recognize the rights of the plaintiff.

The plaintiff testified that he was riding at about 7 or 8 miles an hour and that the automobile was traveling at the rate of 20 miles an hour. The defendant testified that

his automobile was in high speed when he turned into Railroad street. Smith testified that the plaintiff was riding along at a slow gait of 5 to 6 miles an hour. The witness Amelia Frick testified that the automobile was going about 8 miles an hour.

An analysis of the evidence suggests that, if credit is to be given to that which tends to show negligence on the part of the defendant, the plaintiff was injured, while in the exercise of due care himself, as a result of carelessness on the part of the defendant when driving his automobile around southeasterly in front of the plaintiff who was riding east, and, therefore, not bound at that time to assume that the defendant might come from behind and undertake to drive around in front of him. There is some conflict in the evidence as to the exact way in which the front wheel of the bicycle and the rear right-hand side of the automobile actually physically collided. But from the evidence we are of the opinion that the jury were justified in finding that the automobile collided with the bicycle and precipitated the injury in question.

Some argument is made on behalf of defendant that the plaintiff admitted that he was nearsighted and had weak eyes. In answer to that, however, he testified that he could see very well, and further, as the collision was caused by reason of the defendant driving up from the rear, it would have made no difference even if the eyesight of the plaintiff had been exceptionally acute.

After a careful analysis of the evidence, we are of the opinion that we are not justified in overriding the verdict of the jury on the ground that it is manifestly against the

His counsel's was in high speed then he swung into trial and error. Being convinced that the plaintiff was racing along at a slow pace of 8 to 9 miles an hour. The witness media first testified that the motorcycle was going about 8 miles an hour.

In analyzing the evidence minutely, it appears is to the point of what which tends to show negligence on the part of the defendant. The plaintiff was injured, while in the ownership of the mere Alberta, on a family of circumstance on the part of the motorist with injuring his instructor caused unfortunately in fact of the plaintiff who was riding away, and, therefore, not based on what then be reason that the defendant might come then behind and endeavoring to drive around in front of him. There is some conflict in the evidence as to the course they is which the front wheel of the bicycle and the rear right-hand side of the automobile actually physically collided. But from the evidence on the of the witness that the jury were justified in finding that the automobile collided with the bicycle and proximately the injury in question.

Per argument is made in behalf of plaintiff that the plaintiff admitted that in the accident he was momentarily out of his senses. It appears to him, however, on reflection that he could see very well, and further, as the collision was caused by reason of the defendant driving by then the rail, it could have made no difference when at the moment of the plaintiff he was physically but some conditionally sound.

After a careful analysis of the evidence, we are of the opinion that we are not justified in overturning the verdict of the jury on the ground that it is manifestly against the

weight of the evidence.

It is contended on behalf of the defendant that the trial court erred in its refusal to instruct the jury in regard to the Sidewalk Ordinance, but the evidence shows that the plaintiff at the time of the collision was on the street, and not on a sidewalk. The plaintiff had as much right to cross over at the intersection of Main street and Railroad street on the cement crosswalk, which was practically level with the gravel roadways, as the defendant had to drive over it in his automobile. The ordinance pertains only to sidewalks, and cannot be considered as referring to a street crossing.

In Swift v. City of Topeka, 43 Kans. 671, the court said:

> "There can be no question, then, but that a citizen riding on a bicycle in that part of the street devoted to the passage of vehicles, is but exercising his legal right to its use, and a city ordinance that attempts to forbid such use of that part of a public street would be held void as against common right." Pequignot v. City of Detroit, 16 Fed. 311; O'Neil v. Detroit, 50 Mich. 133.

Being of the opinion, therefore, that the verdict was not against the manifest weight of the evidence, and that no error was committed by the trial court, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

might or the strength.

It is contended on behalf of the defendants that the trial court erred in its refusal to instruct the jury in regard to the disparate positions, and all evidence showing that the priority at the time of the collision was on the street, had not the a sidewalk. The plaintiff has no such right to cross over at the intersection of two heavy and well-used streets on the busiest evening, when the probability lead also the great crowd coming, at the crossing but to fling over it in its entirety. The pedestrian perishes only on sidewalks, but moment he ventures on roadway to a street crossing.

In Jones v. City of Toledo, 67 Ohio. 271, the court said:

> "There can be no question, then, but that a citizen riding on a bicycle is not part of the street devoted to the passage of vehicles, is not exercising his legal rights in the use, and a jury instructed that attempts to locate such a city ordinance that attempts to locate such a place was of less rate of a public street would be held was a plain error rights." Jennings v. City of Toledo, 10 Ohio. 77; Elliott v. Lessig, 43 Ohio. 158.

Below of the violent, carelessness, that the vehicle was not violated the motiless rights of the citizens, and that he stops was controlled by the legal speed, the judgment will be affirmed.

AFFIRMED.

O'Connor, J. Lee Kennedy, J. concur.

28089
254 - 28089

(3512a)

A. GOLDSMITH COMPANY, INC.,
Appellee,

v.

CHARLES M. LOBELL, et al On
appeal of CHARLES F. LOBELL
COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

232 I. A. 321

Opinion filed Dec. 26, 1933.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, A. Goldsmith Company, brought suit in the Municipal Court against Charles F. Lobell Company, a corporation, and George M. Lobell, to recover $2390.50, for merchandise sold and delivered, and upon an account stated. In the course of the trial before the court, without a jury, the suit was dismissed as to the defendant George M. Lobell and was then prosecuted against the defendant, Charles F. Lobell Company, alone. There was a finding and judgment in favor of the plaintiff for $2390.50, from which the defendant, the Charles F. Lobell Company prayed and perfected this appeal.

The defendants affidavit of merits expressly denies the purchase and delivery of the merchandise and also denies that there was an account stated.

The merchandise in question, which it is claimed by the plaintiff it sold and delivered to the defendant, was made up of certain fur garments. The plaintiff offered in evidence five duplicate invoices. The first was dated July 14, 1931, directed to Charles F. Lobell and Company at 1135 E. 63rd street, and describes certain furs and set forth the price as

[illegible]
[illegible] - [illegible]

A. [illegible] [illegible], [illegible], appellant,	
	v.
CHARLES G. LUDWIG, [illegible] [illegible] of [illegible] G. LUDWIG, [illegible], appellees.	

[illegible]

[illegible]

[illegible]

Opinion filed Dec. 24, 1925.

[illegible] PRELIMINARY INJUNCTION [illegible] the opinion of the court.

The plaintiff, a [illegible] company, brought suit in the Superior Court against Charles G. Ludwig Company, a corporation, and George G. Ludwig, to restrain [illegible], by wrongfully and fraudulently, [illegible] in unfair trade in the course of the trial before the court, without a jury, the suit was dismissed as to the individual defendant G. Ludwig and the corporation joined issue for defendant, Charles G. Ludwig Company, alone. There was a finding and judgment in favor of the plaintiff for $[illegible], from which the defendant, the Charles G. Ludwig Company, moved and prosecuted this appeal.

The determinative question of merits concerning which the pleadings and testimony of the parties are in conflict is that which was [illegible] [illegible].

The proposition is unusual, which it is claimed on the plaintiff's part and denied on the defendant's, was made up of models for jewelry. The plaintiff obtained a patent [illegible] [illegible] [illegible]. The first was issued July 14, 1925, [illegible] to Charles G. Ludwig and Company in [illegible] G. [illegible] [illegible], and describes certain [illegible] [illegible] the price of

$390.00; the second was dated August 30, 1921, and addressed to the defendant at the same place and stated the price as $505.; the third was dated July 23, 1921, and addressed to Charles F. Lobell Company, 4715 Sheridan Road and stated the price as $310.00; the fourth was dated August 5, 1921, and contained a similar address as the one just mentioned and stated the price as $890.00; the fifth was dated August 29, 1921, and contained a similar address to the last one and stated the price as $365.00.

Although it is contended on behalf of the defendant that those invoices were not admissible, we are of the opinion that as they were made in the regular course of business and were in the nature of originals and the defendant's counsel had stated that he could not produce the original invoices on the ground that his clients had stated to him that they had never received them, the invoices in question were competent, at least, as secondary evidence.

The evidence shows that there were, apparently, two companies in the fur business, one known as the George M. Lobell Company and the other as the Charles F. Lobell Company; that the former is in bankruptcy; that the George M. Lobell Company was located on the north side at 4715 Sheridan Road and the Charles F. Lobell Company on the south side at 1135 East 63rd street; that George M. Lobell was originally one of the incorporators of the George M. Lobell Company when it was located at 940 E. 47th street; that in the summer of 1920 he left that company and went with the Charles F. Lobell Company, of which he became an officer.

The evidence of B. Goldsmith, a salesman for the plaintiff is to the effect that in the spring of 1921 George M. Lobell was at the plaintiff's place of business; that he, the witness,

$250.00; the second was dated August 30, 1971, and addressed to the defendant at the same place and stated the price as $500; the third was dated July 2, 1972, was addressed to Charles F. Lobell Company, 4712 Griffith Road and stated the price as $750.00; the fourth was dated August 6, 1972, and contained a similar address as the one just mentioned and stated the price as $800.00; the fifth was dated August 28, 1972, and contained a similar address to the last one and stated the price as $500.00.

Although it is contended on behalf of the defendant that these invoices were not admissible, on account of the violation that as they were made in the regular course of business and were in the nature of originals and the technically trained judge which he could not produce the original invoices on the ground that his clerks had stated to him that they had never received them, the invoices in question were corroborative at least, as secondary evidence.

The invoices show that they, actually, had connection in the far business, not known as the Charles E. Lobell Company, but the other as the Charles F. Lobell Company; that the former is in Washington; that the Charles E. Lobell Company, was located on the Charles F. Lobell Company on the same site as 4712 Griffith Road and; that Charles E. Lobell was originally one of the incorporators of the Charles E. Lobell Company when it was located at 500 E. 47th Street; that in the amount of $500 he left that company and went with the Charles F. Lobell Company, of which he became the officer.

The evidence of E. Goldberg, a witness for the plaintiff is to the effect that in the spring of 1971 Charles E. Lobell was at the plaintiff's place of business; that he, the witness,

asked him to look at the plaintiff's sample line with reference to placing an order; that George M. Lobell said at that time "to take the merchandise out to Charles Lobell and let him select it for him"; that Charles F. Lobell at that time was at 4715 Sheridan Road; that he, the witness, told George M. Lobell that he would take the merchandise out there; that in the latter part of May he went to the north side place, that is 4715 Sheridan Road, and saw Charles Lobell; that he had with him at that time eighteen fur coats; that he told Charles Lobell that George Lobell had sent him to show the merchandise and for him, Charles Lobell, to select what he would need in his north side store; that Charles Lobell then selected about six fur coats and said, "That's what I want."; that he, the witness, turned that order in to his company; that subsequently the merchandise, as it came out of the factory, was delivered; that when Charles F. Lobell selected the six coats he, the witness, made out the order in triplicate and gave the original to Lobell, put one of the copies in the company's file and the other in the order book; that a few days after that order was taken he, the witness, heard a conversation between George M. Lobell and the witness's father, A. Goldsmith; that his father asked George M. Lobell for the financial rating of the north side concern; that George M. Lobell said "it was one concern, the south side store and the north side store were one concern"; that it was Charles F. Lobell Company operating two stores; that then A. Goldsmith said to George M. Lobell that as long as they were both one concern operating two stores that he would ship the merchandise; that the merchandise was then shipped, one or two coats at a time, until the order was completed; that the goods were shipped in the name of Charles F. Lobell Company to 4715 Sheridan Road.

makes him to look at the plaintiff's muzzle like with refusal to objecting on return; then George G. Lobell said at that time I'm here the superintendent out to Charles Lobell and he has where it not but; and Charles F. Lobell at that time was at 6713 Sheridan road; that no, the witness, told George G. Lobell that he would take the motorcycle and drive; that in the latter part of May he went to his north side office, was in 6713 Sheridan road, was see Charles Lobell; that he was with him at that time sighting for motor; that he told Charles Lobell that George Lobell had sent him to get the motorcycle and for him, Charles Lobell, to select what he wanted in the shop; that Charles Lobell was also there; that Charles Lobell for some reason or other; the witness, stated that order in to his company; that motorcycle, the new condition, as it came out of the factory, was delivered; that when Charles F. Lobell selected his bike the witness, was the order in writing; not have the original to Lobell, put one of the notes in the company's file and the other in the order book; that a few days after that order was taking by, the witness, Lobell's representative between George G. Lobell in the witness's factor, do delivering that bike motor-cycle Lobell, for the financial rating of the north side company that George G. Lobell said "is not use lobell", the north side store and the north side store are the company; that he was Charles F. Lobell company operating he driving that the. Defendant's call to George G. Lobell was as long as they were both the concern operating the store that he would only the same condition; that the merchandise was the witness, not be for the north it a time, until the order was completed; that the goods were delivered in the name of Charles F. Lobell concerning to 6713 Sheridan road.

The evidence of A. Goldsmith, the president of the plaintiff corporation, is to the effect that the latter part of June, George M. Lobell came into his office; that he, the witness, asked him what connection the north side store had with the south side store; that he told George M. Lobell he would not ship the north side store if Charles Lobell owned it; that George M. Lobell then told him "that the north side store is the same as the south side store and to bill the merchandise to Charles F. Lobell Company only change the address so they would know where the different merchandise went to and keep a separate account between themselves"; that that conversation took place before the merchandise was shipped; that later George M. Lobell called and he, the witness, showed him what had been selected; that when he asked Lobell if he wished any merchandise he said that it was not necessary "because he would take it from the north side store as they worked together that way." On cross-examination he stated that bills were sent to both places.

One Leah Fink, bookkeeper for the plaintiff, testified that she heard Goldsmith tell George M. Lobell that the north side store had placed an order and that he "did not care to ship the north side store unless it was one and the same concern, the Charles F. Lobell Company"; that George M. Lobell said "that they were the same concern, it was Charles F. Lobell Company, and the goods were simply shipped to different addresses"; that she knew that the merchandise was later sold to the Charles F. Lobell Company, and that it was delivered; that on one occasion when she was making out a bill and George M. Lobell was present and she remarked that the merchandise going to two different addresses led to confusion, he said, "Well, its just the same, it's all the same concern." "Just be careful that you direct the merchandise to the different addresses, the north side store direct to

The evidence of Dr. Goldsmith, the president of the plaintiff corporation, is to the effect that the latter part of June, George E. Lowell was with his attorney, John Dr. Grove, after all that occurred the night before. Grove had left the court, with Flynn. Then he told George E. Lowell he could not give the corporation the cash, but he would give the corporation a check for the amount. George E. Lowell then said "Then I am ruined." Then Grove said "Well, I'll see what I can do." Then Grove said to George E. Lowell "Don't worry, I'll see what I can do." Then Grove said to George E. Lowell "Don't worry, I'll see what I can do." Then Grove said to George E. Lowell "Don't worry, I'll see what I can do." Then Grove said to George E. Lowell "Don't worry, I'll see what I can do."

The jury find, beyond the reasonable doubt, that the Lowell Company, not that it was actually true, or was believed, that the corporation was indeed in difficulty, and that the defendants knew that George E. Lowell was pressed and had reported that the corporation was going to be in difficulty. As had he committed, he said, "Well, I'm just the same, I'm all the same, I'm all the same." Then he stated that you direct the corporation, the court also where clients to

the north side store, and the south side store to the south side store, but they both are Charles F. Lobell Company.

In the affidavit of merits for the Charles F. Lobell Company, George M. Lobell deposes that "he is the agent and representative of Charles F. Lobell Company".

George M. Lobell testified that he never ordered any goods for the north side store to be charged to the Charles F. Lobell Company; that the two companies were not partners and had no business connection with each other. He admits he was probably in the plaintiff's place of business in May, June, July, August and September, 1921, and that from time to time when he bought merchandise he went to plaintiff's office and looked over its stock; that he bought for Charles F. Lobell Company in 1921, $900.00 worth of goods. He further stated that in August, 1921, at the Pageant of Progress they had a display, and the sign contained the names and addresses of the two stores, the Charles F. Lobell Company and the George M. Lobell Company; that a silver cup was awarded for the exhibit which was displayed in both stores; that on certain boxes in which the south side store shipped merchandise were the words "Charles F. Lobell Company, two stores", and also, the addresses of the north and the south side stores.

In view of the evidence, we are not surprised that the trial judge found for the plaintiff. Evidently, he did not believe the testimony of George M. Lobell. Taking the evidence of the two Goldsmiths; Leah Fink, the bookkeeper; the significant and admitted circumstances of the advertisement at the Pageant of Progress; the invoices, and the admission of his agency, by George M. Lobell in the affidavit of merits for the defendant,

the words side above, and the words side stops at the words side above, but they both are Charles T. Lobell Company.

In the affidavit of service for the Charles T. Lobell Company, Jerome S. Lobell deposes that "he is the agent and representative of Charles T. Lobell Company".

George T. Lobell testified that he never received any goods for the North side store or charged to the Charles T. Lobell Company; that the transactions were not between him and the business conducted with said other. He admits he was probably in the plaintiff's place of business in May, June, July, August and September, 1911, and then from time to time when he bought merchandise he sent to plaintiff's office and looked over the stock; that he bought for Charles T. Lobell Company in 1911, 1912, 1913 and 1914; he further stated that in August, 1911, at the Pageant of Progress he had a display, and the also contained the name and address of the two stores, the Charles T. Lobell Company and the George S. Lobell Company; that a letter was sent for the exhibit which was displayed in both stores; that the matrix here is what the south side store displayed; "Charles T. Lobell Company, two stores", and also, the addresses of the north and the south side stores.

In view of the evidence, we can not accept that the trial judge found for the plaintiff. Certainly, we do not believe the testimony of George T. Lobell. Taking the evidence of the two Goldstein, Jack Stern, the bookkeeper, the signature and admitted statements of the advertisement at the Pageant of Progress; the letters, and the admission of the agent, George S. Lobell in the affidavit of service for the defendant,

Charles F. Lobell Company, we do not feel justified in overriding the judgment of the trial judge. Even without the invoices, the evidence was, amply, sufficient.

The judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

Section 7. Admit Company, we do not find justified in overruling the judgment of the trial judge. Even viewing the in-
vaions, the evidence was simply sufficient.

The judgment will be affirmed.

AFFIRMED.

CONNOR, J., AND THOMAS, G. SPENCE.

(35/3a)

296 - 28131

ALBERT LORENZ, ET AL,
Appellees,

v.

ESTHER LEIBSOHN,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

232 I.A. 221

Opinion filed Dec. 26, 1923.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On March 31, 1917, the plaintiffs, Albert Lorenz and Arthur Lorenz, co-partners doing business as Lorenz Brothers, obtained judgment against the defendant on a promissory note, by confession, in the sum of $1300. On July 12, 1917, the defendant was given leave to plead, the judgment to stand as security.

On July 13, 1917, the defendant pleaded the general issue, and also that "before the commencement of this suit, to-wit, August 13, 1915, she paid to the plaintiffs and the plaintiffs accepted from her, defendant, divers moneys amounting to a large sum, to-wit, $1,000, in full satisfaction and discharge of the said several promises and the sums of money last aforesaid," etc. That plea was verified. The affidavit of verification recites that the defendant paid Mass, the payee of the note, the money due upon the note and that he delivered it to the plaintiffs and that the latter assured him "that they would surrender said note as soon as they could get their own indebtedness paid so as to

Opinion filed Dec. 26, 1923.

Mr. Justice Dotson delivered the opinion of the court:

On March 13, 1917, the plaintiffs, Albert Lorenz and Anthony Lorenz, co-partners doing business as Lorenz Brothers, obtained judgment against the defendants on a promissory note, by confession, in the sum of $1200. On July 14, 1917, the defendants were given leave to plead, the judgment to stand as security.

On July 16, 1917, the defendants pleaded the general issue, and also that before the commencement of this suit, to-wit, August 16, 1916, the paid to the plaintiffs and the plaintiffs received from them, defendants, divers goods amounting to a large sum, to-wit, $1,000, in full satisfaction and discharge of the said several promises and the cause of money last mentioned, etc. That plfs was satisfied. The sufficiency of replications replies that the defendant paid cash, the terms of the note, but money has since the term and that he delivered it to the plaintiffs and that the latter accepted the "that they would accept said note or more as they would not take the indebtedness paid on or to

release said note which was up as collateral for their own debt."

Subsequently, there was a trial, and a verdict and a judgment for the plaintiffs in the sum of $1200, and an appeal to this court. (Gen. No. 24379)

That judgment on May 21, 1919, was reversed, first, on the ground that the trial court erred as to the admissibility of some of the evidence, and, second, in giving a certain instruction.

Upon a remandment of the cause, the defendant on March 22, 1920, filed a further plea alleging that the note in question was delivered by the payee to the plaintiffs without consideration; that the plaintiffs were not bona fide holders for value of the note, and that they received it from the payee only for their accommodation and without any good or valuable consideration.

There was then another trial before the court, with a jury, and a verdict for the plaintiffs in the sum of $1,000. There was a remittitur of $300.00 by the plaintiffs, and judgment was entered in their favor and against the defendant in the sum of $699.20. From that judgment this appeal was taken.

Although at the first trial the claim of the defendant was that she had fully paid to the plaintiffs the amount of the note, at the second trial, under her new plea, she claimed that the note was originally issued by her to one Philip Mass, who in turn endorsed it for accommodation to the plaintiffs "with whom he had an open account, and

relevant will note which has to be neglected for which one lack.'

Subsequently, there was a trial, and a verdict and a judgment for the plaintiffs in the sum of £170, and an appeal to this court. (Ibid., No. 24/2)

That judgment on May 24, 1912, was reversed, first, on the ground that the trial court erred as to the qualifications of some of the witnesses, and, secondly, in giving a certain instruction.

Upon a consideration of the cause, the reference on March 25, 1910, filed a further plea alleging that the made in question was delivered by the owner to the plaintiffs without consideration; that the plaintiffs were not bona fide holders for value of the note, and that they received it from the payee only for their accommodation and without any good or valuable consideration.

There was then evidence taken before the court, with a jury, and a verdict for the plaintiffs in the sum of £1,000. There was a remittitur of £800.00 by the plaintiffs, and judgment was entered in their favor and against the defendants in the sum of £200.00. From that judgment this appeal was taken.

Although at the trial the claim of the defendants was that the bad faith said to the plaintiffs had amount of the note, at the second trial, under her own view, she claimed that the note was originally issued by her to one Philip Jones, who in turn endorsed it for accommodation to the plaintiffs, which claim he had in good account, and

solely for their accommodation; that said note was paid to Philip Mass, payee," and was thereby extinguished. The present contention ofcounsel for defendant is that the verdict is contrary to the weight of the evidence.

The plaintiffs, cement contractors, in the fall of 1914 and in the course of the year 1915, did several jobs of cement work for Mass, amounting to about $15,000. In the year 1915 the plaintiffs did a job of cement work on a thirteen apartment building at Springfield avenue and 13th street, which was being constructed by Mass as principal contractor for the defendant, Esther Leibsohn. The plaintiffs were sub-contractors under Mass. On July 27, 1915, the plaintiffs received the note in question from Philip Mass. The note was dated July 13, 1915, and was for the sum of $1,000, payable one month after date to the order of Philip Mass, and was signed as maker by the defendant Esther Leibsohn.

One of the plaintiffs, Arthur Lorenz, testified that he took the note from Mass in payment of $500, which was long past due; that, at the time, he had three jobs under construction for Mass; that when he requested money of Mass the latter told him that money was not coming in as he expected; that he, Lorenz, had another note which he got from Mass for $500, which was overdue and unpaid, and was given for other work; that Mass said he did not have the money, and asked him, the witness, to take the $1,000 note in payment of the $500 note, which was past due, and give him credit for the balance; that after the $1,000 note became due, he asked Mass a number of times to pay it; that on

solely for their entertainment; but will note the pain to Philip Dean, Jones, and the Harvey entanglement. The present committee attempted to determine if that the verdict is contrary to the weight of evidence.

The plaintiffs, counsel contended, in the fall of 1914 and in the spring of the year 1915, did several jobs of sewer work for Jones, amounting to about $13,000. In the year 1916 the plaintiffs did a job of sewer work on a Ottawa apartment building at Springfield avenue and 12th street, which was being constructed by Dean as principal contractor for the defendant, Esther Lehman. The plaintiffs were sub-contractors under Dean. On July 27, 1916, the plaintiffs received the note in question from Philip Dean. The note was dated July 10, 1916, and was for the sum of $1,000, payable ten months after date to the order of Philip Dean, and was signed on behalf by the defendant Esther Lehman.

One of the plaintiffs, Esther Lehman, testified that he took the note from Dean in payment of $500, which was long past due; that at the time, he had other jobs under consideration for them; that when he commenced doing of work the latter told him that money was not coming to us he expected that he, Lehman, had another note which he got from Dean for $500, which was payable ten months, and was given for other work; that Dean said he did not have the money, and asked him, the witness, to take the $1,000 note in payment of the $500 note, which was past due, and give him credit for the balance, that after the $1,000 note became due, he made some a number of times to pay it; that he

one occasion Mass told him "Mrs. Leibsohn didn't get her money from Michigan yet," that not being able to collect it, he, Mass, turned it over to his attorney; that five or six months after the note was due he saw the defendant and asked her for payment of the note, and she told him that it had been paid to Mass; that subsequently he saw Mass, who admitted that he had received the money and said "he was going to give you some money in return as soon as he could." On cross-examination he testified that the $500 note referred to was made by Fisher & Branson; that the $1,000 note was given him by Mass in payment of the past due Fisher & Branson note for $500, and "the rest on general account;" that at that time he did not return the Fisher & Branson note, as he did not have it with him, but did return it six months later. He further testified that in July 1915, when he took the note from Mass he was working on three or four jobs for Mass, and that at that time when he received the note there was due him about $2500.

Counsel for the defendant rely upon the plaintiffs' books of account and claim that they show that the note was given for accommodation only. But Lorenz testified that his books did not show all that was due at the time he got the note. When asked upon cross-examination whether he could tell from his books just what amount Mass owed on July 27, 1915, Lorenz said that he could not tell from the books, that he would have to look up the job records; that, as building contractors, plaintiffs were entitled to draw to the extent of 85% after the work reached a certain stage of completion, and that the final bill is not made out until the job is completed; that the money is collected as due before it is charged up on the books and before the final bill is made out. In view of

one remarking that this man "Mr. Lafferty didn't put her money into anything yet." Not wishing only to believe it, he, then, turned it over in his attorney; that five or six months after the note was due he was the defendant and asked her for payment of the note, but she told him that it had been paid to Grant that subsequently he saw Dora, who admitted that he had received his money and said "he told you to pay you some money in return as soon as he got it." On cross-examination he testified that the 1900 note returned to she made by Flint & Mooney, that he $1,100 note was given the by Grant in payment of his part for Lafter & Brewster for $800, and "the last he heard concerning" that he was then he was running the Lafter & Brewster note, he did not have it with him, but did return it not moving large. In further testified that in July 1901, when he made the note from Dora he was working on Grant at that job for them, and that at that time when he presented the note Dora was the owner thereof.

Counsel for the defendants then made the plaintiff's book of account and claim that they show that the note was given for commodities only. But Lorenz testified that his books did not show all that was due at the time he got the note. Then came upon cross-examination whether he could tell from his books just what amounts were owed on July 27, 1898, Lorenz said that he could not tell from the books. Then he would have to look up the job results that, in building contracts, plaintiffs ever attempted to done to the extent of $25 after the work reached a certain stage of completion, and that the final bill is not made out until the job is completed; that the money is retained as due before it is received by the lender and before the final bill is made up. In this he

that evidence it follows, if the jury believed it, that the plaintiffs received the note in question not for accommodation, but at least in part payment of moneys already due. It is true that Mass testified that he gave the plaintiff the note in question several days after he had settled with him; that he told him if he could make use of it to go ahead and take it, and if not, to bring it back, and that he did it as a matter of accommodation. The evidence of Mass, however, contains certain discrepancies. His testimony as to that transpired on December 31, 1915 when Lorenz presented him with a statement does not seem to be in any way reasonably consistent with the theory of accommodation. His testimony was as follows:

> "He brought me this statement. I told him to give me the thousand dollar note of Mrs. Leibsohn's. He said 'I can't get it.' I said, 'the note I got to have and this note you promised me to bring back', and he said 'I can't get it. I owe money and I got it on collateral with other notes.' I said, 'Give me a receipt.' He didn't want to give me a receipt. I said, ' got to show something for the thousand dollars. I don't owe you a thousand dollars on it.' He said, 'You owe me $500.00' and I said, 'I don't owe you $500.00 either.' He said 'You owe me $500.00 anyhow' and I said, 'You got to give me something to show.' He didn't want to give me anything. Then I said 'Put something down to show the difference of the thousand dollar note for the $500.00 note.' So he wrote down here that '$500.00 Leibsohn note was $500.00 unpaid.' That is all he would give me."

The fact that Mass admits that he was willing at that time to allow Lorenz to make an entry on the statement of December 31, 1915, "$1,000 note of Mrs. Lipstein is $500 unpaid" is very significant and evidently had some weight with the jury, inasmuch as their verdict was for $500 with interest.

There were offered in evidence by the defendant certain written statements by the plaintiffs, but in view of the evidence of Lorenz that the books did not necessarily show at any

that testimony is failing, if the jury believed it, then the plaintiff's counsel was able to question not for commentation, but as there is very grounds of money already due. If he stops this then certainly that he just the plaintiff the right in question worried that after he had settled with they that he this his if he could take now of it to go about and take it, and if not, to bring it back, and then he did it as a matter of accommodation. The evidence of that, however, contains certain discrepancies. His testimony on the first trial on December 21, 1923 when lawyer presented his with a statement that not seem to be in any way reasonably consistent with the theory of accommodation. His testimony was as follows:

"We talked on this statement. I tell him to give me the thousand dollars at 10%. Lawyer's'n said 'I won't get it.' I said, 'Why then I get to have my this note you promised me to money back.' and he said 'I won't get it.' I was money and I get it on mortgages with other notes.' I said, 'Give us a receipt.' He didn't want to give me a receipt. I said, I get to show something for the money. I don't see you a thousand dollars on it.' he said, 'You owe me $500.00' and I said, 'I don't owe you half, it either.' He said 'You owe me 500.00 anyway' and I said, 'You get no give me everything to show.' He didn't want to give me anything. Then I said 'Get something down to show the difference of the thousand dollars for the 500.00 dues.' He go write down here that '500.00 indemnity note and 500.00 repaid.' This is all he... don't give me."

The jury that may believe that he was nothing is what time to allow lawyer to make in every of the statement of December 21, 1923, "Mr.Cox said of the. Lawrence in 1924 account is very significant and evidently had some weight with the jury, inasmuch as there verdict was for 1924 with interest.

There was difficult in evidence by the letters of certain writing statements by the plaintiff, not in view of the evidence of lawyer that he knew his is not necessarily show as any

given time just what the exact account then was, they are not decisive. There was also given in evidence the testimony of one Rubin, a brother-in-law of Mrs. Leibsohn, to the effect that he called up Lorenz nearly every week in the latter part of the year 1915, and Lorenz promised to return the note. Rubin was the manager of Mrs. Leibsohn's business, and he testified that Mass was the general contractor for the erection of Mrs. Leibsohn's building; that the contract amounted to $30,000, and that he, Rubin, attended to the payments. Mrs. Leibsohn testified that she had paid the note in question, that is, to Mass, but that Lorenz called her up sometime during the first of the year 1916 and told her that he held that note; that later Mr. Lorenz and his attorney, Mr. McCracken, told her that they would make trouble for her if she did not go after Mass; that subsequently another conversation took place at which the same parties were present, and in addition Rubin; that during that conversation they said they knew that the note was paid.

The evidence is contradictory. However, considering that two trials have taken place, that at the first trial the defendant pleaded that she had paid the note in full to the plaintiffs themselves, which was not true; that at the second trial she pleaded not payment but that the note was given by the payee Mass to the plaintiffs as an accommodation and without consideration; that the plaintiff's testimony taken by itself is to the effect that at the time the note was given to him by Mass the latter was his debtor and the note was given for a consideration; that the plaintiffs explain the statements of account by the fact that at the time the note was given work was being done on several jobs, 85% of which was due at certain

given him just what the-stuff-thought-that-was, they were not-satisfied. There was also going to-relieve the-feeling of-one-fuddle, a-mouse-in-the-house of-gas. Indeed, to the effect that be-unlike-up-across-nearly-every-week-in-the-latter-part of the year 1933, and-lacks-remained to-return-the-note. Yubin was the-property of-Mr. Lightfoot's-husband, and-he testified that-when-was-the-general-conditions-for-the-erection-of-Mr. Lightfoot's-building, that-the-removal-should-be-[illegible], was-that-he, Yubin, attended-to-the-payment. Mr. Lightfoot-testified-that-he-had-not-the-time-to-make-it, that-he, he-that, but-that-Mr-Yubin-called-him-to-make-time-during-the-first-of-the-year-1932-and-said-that-he-had-that-note; that-later-Mr. Lightfoot-and-his-attorney-Mr. Dufresne, said-he-that-been-would-make-trouble-for-him-if-she-did-not-go-after-them; that-subsequently-another-conversation-took-place-at-which-Mr-Yubin-another-was-present, and-in-addition-Yubin-that-during-that-conversation-they-said-they-knew-that-the-note-was-gone.

The evidence is contradictory. However, considering that-the-trial-have-taken-place, that-in-the-first-trial-the defendant-claimed-that-she-had-not-the-note-in-full-in-the possibility-themselves, which-has-not-been-said-at-the-second trial-she-should-not-proceed-but-that-the-note-was-given-by the-payee-back-to-the-plaintiff-as-an-accommodation-and-without consideration; that-the-plaintiff-testimony-taken-by-letter is-to-the-effect-that-at-the-time-the-note-was-given-to-him-by-Mrs-Mr-latter-was-his-brother-and-the-note-was-given-for-a consideration; that-the-plaintiff-during-the-testimonies-of-witness-by-the-that-that-at-the-time-the-note-was-given-was being-done-an-arrangement-[illegible], 800-of-which-was-he-at-certain

given periods as the work progressed, but was not entered in any book of account until the job was completed; that the jury saw the witnesses and were in much better position to determine their credibility than we are; that the Negotiable Instrument Act (Cahill's Rev. Stat. 1923, p. 24) provides that "Every negotiable instrument is deemed prima facie to be issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value;" and as the burden of proof, where a judgment is vacated and the defendant sets up failure of consideration or accommodation, is upon the defendant, we do not feel justified in overriding the verdict of the jury.

Finding no substantial error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

given relative to the vote expressed, but was not material in any sense of showing that the jurors deciding that the jury saw the witnesses and were in such better position to determine their credibility that we are; that the evidentiary instrument and (Smith's new. Stat. 1972, p. 34) provides that "every negotiable instrument is deemed prima facie to be issued for a valuable consideration, and every person whom signature appears thereon to have become a party thereto for value;" and in the burden of proof, where a judgment is reversed and the defendants made up failure of consideration or transmutation, is upon the defendants, so do not feel justified in overriding the verdict of the jury.

Finding no substantial error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR, J., and THOMAS, J., concur.

(3514)

130 - 27964

VICTOR MANUFACTURING AND CASKET CO., a corp.,

Appellant,

v.

MICHAEL ROSENBERG AND MOE ROSENBERG, doing business as Rosenberg Iron and Metal Co.

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

232 I. A. 222

Opinion filed Dec. 26, 1923.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendants to recover $1853.64, claimed as a balance due for scrap copper, which it sold and delivered to the defendants. Plaintiff's contention was that it had sold and delivered to the defendants 70,768 lbs. of scrap copper at 16-3/4¢ per pound; that when the contract between the parties was made the defendants paid plaintiff $10,000.00, and a few days thereafter the copper was delivered in eighty boxes, numbered consecutively from one to eighty both inclusive. The defendants filed an affidavit of merits, in which they admitted the purchase by them of the scrap copper at 16-3/4¢ per pound, but averred that plaintiff had not delivered to them boxes numbered one to eight; that the copper contained in the other boxes numbered from nine to eighty had been received by them, on which there was still a balance due of $268.08, which they tendered plaintiff. There was a trial before a judge and a jury and a verdict rendered in favor of the plaintiff for $268.08, the amount the defendants admitted they owed, to reverse which the plaintiff prosecutes this

(351/4a)

120 - 27304

Vilter Manufacturing and Supply Co., a corp., Appellant, v. Milwaukee Refrigerator and Ice Co., defendant, Appellee.	Appeal from Milwaukee Municipal Court. Hon. Carl Sanborn, Judge.

Opinion filed Dec. 26, 1922.

Mr. Justice Stephenson delivered the opinion of the court.

Plaintiff brought suit against the defendants to recover $1887.04, claimed as a balance due for scrap copper, which it had sold and delivered to the defendants. Plaintiff's contention was that it had sold and delivered to the defendants 70,700 lbs. of scrap copper at 12-1/4¢ per pound; that upon the contract between the parties was made the defendants paid plaintiff $10,000.00, and a few days thereafter the copper was delivered in eighty boxes, numbered consecutively from one to eighty both inclusive. The defendants filed an affidavit of merits, in which they admitted the receipt by them of the scrap copper at 12-1/4¢ per pound, but averred that plaintiff had not delivered to them some number one to eight; that the copper contained in the other boxes measured from nine to eighty had been received by them, on which there was still a balance due of $1887.04, which they declared plaintiff. There was a verdict below a Judge and Jury and a verdict rendered in favor of the plaintiff for $1887.04, the amount the defendants admitted they owed, to reverse which the plaintiff prosecutes this

appeal.

Plaintiff contends (1) that the verdict is against the manifest weight of the evidence, and (2) that the court erred in admitting over its objection, three letters written by the defendants to the plaintiff after the delivery of the copper, because the admission of them violated the general rule, that the declarations of a party in his own favor are not admissible in his behalf.

In passing on the plaintiff's first contention, it becomes necessary for us to discuss the evidence in detail. Anthony S. Victor, who is General Traffic Manager for plaintiff, testified that on May 10, 1930, the defendant Moe Rosenberg called at plaintiff's place of business in an automobile; that at the same time there was an automobile truck which Rosenberg stated had come for the copper; that the witness together with one John Chandler, another employee of the defendant and some laboring men loaded the eight boxes on the truck; that Rosenberg then drove away in his automobile, and the truck left with the eight boxes of copper in controversy; that Rosenberg was present when the truck was loaded; and that Chandler made a memorandum on a slip of paper as to the number and weight of the boxes. He testified, however, that he was not certain whether it was on May 10th that the delivery was made, but that his best recollection was that that was the date. He further testified on cross-examination that plaintiff had other customers who called for scrap copper on that date but later he testified that on the day in question no one called for copper at plaintiff's place of business except the defendants; that it was not his duty to ask the driver of the truck or persons who called for goods for a receipt for the

goods delivered; that this was Mr. Chandler's duty; that he did not know whether Chandler had obtained such receipts at the time. He further testified that Joe Rosenberg the defendant, called more than one time; that he called twice, but later said he had called six times. Counsel for the defendants then showed the plaintiff receipts which they had given plaintiff for the copper when it was delivered, and they were identified by the witness. He further testified, after more or less uncertainty, that the receipts were gone; that he did not know where they were; that they might be in some other person's possession. The witness also testified that he was not positive whether it was May 10th or May 11th; that defendants got the first load but that it was some where around the 10th.

Chandler testified that he was plaintiff's Assistant Traffic Manager; that sometime in May he received an order to box up the copper in question; that he and the witness Victor weighed and numbered the boxes, giving the gross, tare and net weights. He identified a memorandum of scrap copper which he had made showing the scrap copper plaintiff had sold and delivered and which included copper delivered to other customers of plaintiff's as well as to the defendants; that the memorandum was in his own hand writing; and showed the day the copper was weighed. It was headed, "5-10-20, Loaded out Rosenberg & Co." He further testified that they first started to fill the boxes with the copper on May 10th as shown by the memorandum; that he superintended the work; that he was present at the time the eight boxes were loaded on the Rosenberg truck, which was in charge of a driver; that Rosenberg was present at plaintiff's place of business,

Quite curiously, that bit was on Dr. Gunther's copy, that he did not have another Dunster but published such passages at his time. In further textual use of Dunstery for Gatchouse, noting more than one thing that he noticed being not by but within six times. Consent for his difficulty that answer the distinctly evolving which had given clarity for the answer when it was difficult, and they were interfered by the answers. In further legislation, other more or less unnecessary, but the passages were quite; that he did not know where they were; they should be more where pleasantly speculative. The witness also testified that he was not positive whether it was one time or the first; that determination has been taken but that it was even where answer the case.

Question arrested that he was initially

Assistant Public Defender: Will something in my be received so either to him or to the answer to questions; this is not the witness Tiedo subject to answered the house, giving the proof, this was not relevant. In examining a conversation at Rose Manor which he had with Inspector the state Sheriff Bill did not definitely and with Inspector Gunter Gilliam if he other evidence of physicality as well as to the witness; after that the conversation one in the are been nothing to answer the by the house and subject. It was answer, "A-Sir-no", looked his knowing c to. "At further testified that this time stated to kill the house with. The house as any jobs as given by the conversation that is conversational the most, that he was present at the time. The right house was buried as the laboratory room, which was in charge of a corner; that inserted the present or physicality room or house.

having come in an automobile; that Rosenberg called at plaintiff's place of business on several different days; that scrap copper was delivered to him on each day; that scrap copper was delivered to the defendants on May 10th, 11th, 12th, 13th and 14th, 1920; that concerns other than the defendants were in the habit of calling at plaintiff's place for scrap copper; that it was the plaintiff's custom to obtain receipts for all merchandise delivered; that he got a receipt for every box of scrap copper delivered to the defendants; that he did not have the receipts for the first eight boxes; that he did not know whether the plaintiff had them or not. He identified the receipts which apparently were shown to him by counsel for the defendant, which were the receipts given by defendants to plaintiff at the several times scrap copper was delivered. These receipts covered all of the boxes, except the first eight,- the ones in controversy. This is substantially all the material evidence offered by the plaintiff.

The defendants offered in evidence three receipts, dated May 11, 1920, which they had given plaintiff for three loads of scrap covering eight boxes to the load; also three receipts dated May 12th, showing that they received three loads containing eight boxes each on that date. They also introduced two receipts for two loads, dated May 13th, 1920, and one for one load dated May 14th, 1920. Each of the receipts is for eight boxes. These nine receipts show that defendants received from the plaintiff 72 boxes of scrap copper, about which there is no controversy.

Moe Rosenberg, one of the defendants, testified that he did not drive any of the trucks on which the scrap copper was loaded

having done it on instructions; that Everybody Relief at Plaintiff's plan of business on several different days; that some money was delivered to him on such day; that same money was delivered to the defendants on my left, like, then, left that left, least that evening when the defendants were in the body of waiting at Plaintiff's place for some payment; that it was for Plaintiff's money to obtain receipts for all arrangements delivered; that he got a receipt for every box of money delivered to the defendants; that he did not sure the receipts for the first eight boxes; that he didn't know where the receipts had been by not. He identified the machine which apparently were there in his by because for the defendants, which from the receipts given by defendants to Plaintiff as the several times being repaid was delivered. There receipts amount all of the boxes, except the first eight,- he had in recovery. This is substantially all the material evidence offered by the Plaintiff.

The defendants offered in evidence three receipts, dated July 11, 1920, which they had given Plaintiff for three loads of scrap covering eight boxes in the local time from Pendleton dated July 1st, showing that they received that eliminating eight boxes such on that date. They also introduced the receipts for the loads, dated July 12th, 1920, and one for one load dated July 14th, 1920. Some of the receipts to the eight boxes. These also showed that they deliverers received from the Plaintiff 70 boxes of waste scrap, small with some is no recovery.

The testimony, as to the defendants, testified that he all was delivered of the boxes on which the same money

was loaded; that he called two or three times at plaintiff's place of business when copper was delivered to the defendants; that he did not follow the driver of the truck from plaintiff's place of business to the defendants' place of business, but that on each occasion when a load was brought to the defendants' place of business, he checked up the amount with the duplicate ticketor receipt which defendants had given plaintiff when the copper was loaded on the truck; that when the copper was received by the defendants he re-weighed and checked it and that he afterwards sold it to the Crane Company. He further testified that he was at plaintiff's place of business when the first load of copper was loaded and that the driver gave plaintiff a receipt for the copper; that there was 9466 lbs. less copper delivered to him than the plaintiff claimed.

Defendants then offered in evidence three letters written by them to the plaintiff. The first was dated June 7, 1920, in which they advised plaintiff that they had received plaintiff's invoice dated May 19, 1920, and that upon checking up the copper received there was but 61,302 lbs. and not 70,768 lbs. called for by the invoice, and requested plaintiff to re-check the same and notify defendants as to whether they were correct. The second letter from defendants was dated June 25th in which they stated:

> "We are in receipt of your return of our letter to you dated June 7th, also your original invoice No. 0043, and reference the same beg to inform you that we have again re-checked this shipment and find the same results as stated in our favor of the 7th, namely, a shortage of 3466 lbs.
>
> From the weights on your invoice it would appear that eight cases meant for us were never

was lucky; that he called two or three times on plaintiff's place of business when neither was delivered to the defendant; that he did not follow the driver of the truck from plaintiff's place of business to the defendant's place of business, but that somewhere during that a load was brought to the defendant's place of business, he checked up the driver with the duplicate ticketer from plaintiff which defendant had given plaintiff when the driver was loading in the array; that when the driver was received by the defendants he received and checked it and then he afterwards put it in the check department. He further testified that he had at plaintiff's place of business when the first load of coffee was loaded and that the driver made plaintiff's receipts for the coffee; that there was paid the last driver delivered to him then the plaintiff without.

Defendants then offered in evidence their letters written by them to the plaintiff. The first was dated June 7, 1943, in which they returned plaintiff that they had received plaintiff's invoice dated July 12, 1943, and that upon checking up the driver counted there was 88,[illegible] lbs. and not 87,[illegible] lbs. called for by the invoice, and requested plaintiff to re-check the case and notify defendants as to whether they were correct. The second letter from defendants was dated June 9th in which they wrote:

> "In re: In receipt of your letter of our letter to you dated June 7th, also your original invoice No. 0042, and referring the same to, so before you that we have again re-checked this shipment and find the same results as stated in our letter of the 7th, namely, a shortage of 3800 lbs.
>
> From the weight on your invoice it would appear that slight error would for we were never

delivered to this destination.

We further wish to state that we still have this stock on hand, and if you do desire, we will gladly co-operate with a representative of your company in re-checking the same again.

Kindly let us know your wishes in the matter and oblige."

The third letter from the defendants to the plaintiff was dated July 22, 1920 and is as follows:

"We are in receipt of your favor of 21st inst. and note its contents.

We sincerely regret that an error was made in your shipment, which has caused this misunderstanding but our records show that we only received 61,302 lbs. as stated in our two previous letters to you. Furthermore we dold this lot of mdse. to The Crane Co. about two weeks ago and checked it up at that time again, and found the same result as on our two previous checks, namely a shortage of 9466 pounds.

We wish to particularly call your attention to our letter to you dated June 25th, in which we again called your attention to this shortage and asked you to send a representative to check up this mdse. while it was still here, to which we had no reply.

We stand willing and ready to pay any balance due you for mdse. received, and if you will send us a corrected statement, deducting for the mdse. short we will give the same our very immediate attention."

The driver who gave the receipts to plaintiff was not called nor was any explanation made why he did not testify.

After a careful consideration of all the evidence in the record, we are unable to say that the finding of the jury, to the effect that plaintiff had not delivered to the defendants the copper in controversy, is against the manifest weight of the evidence. While the testimony of Victor and Chandler is to the effect that they delivered the eight boxes on May 10th, it is perfectly clear that they were not positive as to the date. A careful reading of the testimony given by Victor, leads one to the conclusion that he was not

believed to this distribution.

In further wish to advise that we shall keep this matter on hand, and if you do desire, we will gladly co-operate with a representative of your company in re-shooting the same scene.

Hoping to be able to be of service to the motion picture and oblige,

The chief issues from the distributors to the circuits and dated July 20, 1919 read in as follows:

"We are in receipt of your letter of July 14th, and note the contents.

We sincerely regret that we have run some in your difficulty, which was caused also unknowingly but we assure you that we very greatly appreciate the fact that you have called our attention to the matter.

We wish to particularly call your attention to our letter to you dated June 24th, in which we clearly outlined our intention of the showing and asked you to send a representative to look on this scene. While it was still here, we could do so readily.

We should willing but sorry to pay any inconvenience and loss for you. Kindly, and if possible send us a corrected statement, deducting for the made. Short we will give the same our very immediate attention."

The letter was given the exhibitor to show

still was not satisfied and by inadvertence later why is

the not exactly.

After a careful consideration of all the evidence in the record, we are unable to say that the finding of the jury, or the action that jurisdiction was adjudged to be, violate the copyright in controversy, is in that determination which rights of the defendant. While the testimony of Fabrey and Goodwin in the effort at show defendant the right based on the film, it is particularly clear that they were not qualified as to the date. A certain knowing of the testimony given by Fabrey, leads one to the conclusion that he was not

at all certain of the particular day on which he claimed the eight boxes were delivered; and as to the testimony of this witness, it is not to be wondered at that the jury apparently did not place much credence in what he said. The evidence shows that it was plaintiff's custom to obtain a receipt in every case where copper was delivered and the testimony of Chandler is that he obtained a receipt from the driver of the truck for all of the copper delivered to the defendants. All of those receipts, except the one for the eight boxes in question are in the record. The receipts for the eight boxes is not accounted for. Chandler testified, he did not have it but that possibly the plaintiff did have the receipt. There is no evidence that plaintiff made any effort to locate this receipt, and while of course, it was not essential that plaintiff produce receipts, it is obvious that its failure to do so was taken into serious account by the jury, as was perfectly proper. Upon a consideration of the entire evidence on this phase of the case, it is obvious that we cannot say that the finding of the jury is against the manifest weight of the evidence.

2. The plaintiff further contends that the court erred in overruling its objection to the three letters above mentioned, because they were in the nature of self-serving declarations. As stated by counsel for plaintiff: "They certainly fall far short of proving anything and should not have been admitted in evidence, as the statements therein do not even have the sanction of an oath to sustain them." The general rule is that the declarations of a party in his own

at all events of the particular day on which the claimant brought some sort injuries, and on the testimony of this witness, it is not so apparent to find the jury erroneously did not judge such conflicts in what he said the witnesses seem that it was plaintiff's duties in ob-tain a receipt in every case after paying the attorney and the propriety of insisting is that he received a re-ceipt from the agent of the company for all of the payment delivered to the defendants. All of these matters, except the one for the right thereon is questions for the jury. The rulings for the right thereon is not sufficient for Counsel's contention, he did not lose it but that existing the plaintiff had from the receipt. Their is no evidence that plaintiff said, by affect to income this receipt, and while of course, it was not conclusive that plaintiff con-duct involved, it is obvious that the failure to do so was taken into account against by the jury, for was reasonably proper. Upon a consideration of the entire evidence on this phase of the case, it is obvious that we cannot say that the finding of the jury is against the material weight of the evidence.

2. The plaintiff further contends that the court erred in overruling the objection to the three letters shown mentioned, because they were in the nature of self-serving de-clarations. In stating of counsel for plaintiff: "They con-tainly that the court of proving anything for should not have been admitted in evidence, as the statements therein do not even have the character of an offer to settle them." The general rule is that the declarations of a party to the use

favor are not admissible in his own behalf. But we think this rule was not violated by the ruling in the admission of the letters. The first letter merely notifies the plaintiff that defendants had received the invoice, had checked up the copper received and that there was a shortage. The second letter of June 25th is substantially to the same effect; as is also the third letter of July 22nd. These letters are all signed by Rosenberg who testified on the trial. If there was any matter mentioned in the letters, concerning which the plaintiff desired the sanction of an oath, it could have cross-examined the witness. Moreover, the witness who read the letters testified to the fact that he re-checked the copper and weighed it, and that there was a shortage. This is the substance of what was stated in the letters. We think the ruling of the court entirely proper. If one of the defendants had met a representative of the plaintiff on the street on June 7th and had stated orally that defendants had received the invoice, but that there was a shortage, no one would contend that this conversation could not have been brought to the attention of the jury, and the fact that it was contained in a letter can make no difference.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

Among our own substitute in fact has merit. But at times
their role was not violated by her voice in the admission
of the lawyers. The first issue merely settling the plain-
tiff that testimony has received the invoice, had drawed
up the money received has that there was a mortgage. The
second issue at time only is questionable in the less effect;
as is also the total issues of jury fees. These letters are
all signed by Lawrence who testified on the trial. It leave
was any matter material in the letters, considering which by
plaintiff showed the handling of it right, it would have
cross-examined the witness. However, the attorney for
the latter satisfied at the first hour of examination the
mortgage was signed by, and that were the a mortgage. This
is the substance of what was stated in its testimony. We
think the ruling of the court materially correct. It was of
the defendants that not a preponderance of the evidence
so has stated in this fact the not trial broken, merely that Jackson
made the received the invoice, but that there was a mortgage,
so one would consider that this assessment which was also been
brought to the attention of the jury, not the fact that it
was mentioned in a letter has made no difference.

The judgment of the municipal court is therefore
affirmed.

JUDGMENT AFFIRMED.

Filed, F.A. Ant Mortgage, 1. Jury's.

27990
155 - 27990

(35154)

B. L. SALTZMANN,

Appellee,

v.

F. J. LEWIS MANUFACTURING COMPANY, a corp.,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

232 I.A. 322

Opinion filed Dec. 26, 1923.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $5,000.00, claiming that defendant had sold him some lumber and that it had misrepresented the quality and quantity of the lumber; that prior to the time plaintiff had purchased the lumber from the defendant, he had informed it that he was going to resell the same; that the lumber was not as represented; and that by reason thereof, plaintiff's customer refused to accept it; that plaintiff had paid the defendant the purchase price for the lumber in advance, viz: $1477.68; that in addition to this sum plaintiff sustained damages on account of plaintiff's purchaser refusing to take the lumber. The case was tried before the court and there was a finding and judgment in plaintiff's favor for $1798.59, and this appeal followed.

The record discloses that the defendant sold plaintiff two carloads of lumber, one car at $35.00 per thousand feet and the other at $28.00 per thousand feet. Plaintiff testified that he sold this lumber to his customer the Elaborated Ready Roofing Company at $32.00 per thousand feet, but that the latter refused to accept it; claiming that the lumber

B. L. BRATCHER,

Appellee,

v.

F. W. LEWIS CONSTRUCTION COMPANY, a corp.,

Appellant.

APPEAL FROM
CHAMPAIGN COUNTY
DE BRAUN.

Opinion filed Dec. 20, 1965.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff worker sued appellant for damages to recover $4,000.00, claiming that defendant had told him that it had abandoned the liability and security of the lumber; that prior to the time plaintiff had purchased the lumber from the defendant, he had informed it that he was going to repair the roof; that the lumber was not to be replaced; and that by reason thereof, plaintiff's business reputation was ruined in that plaintiff had paid the defendant the purchase price for the lumber in advance, yet itself, by that in reliance on the plaintiff's previous dealings and account of plaintiff's business relating to the lumber. The case was tried before the court and that was a finding and judgment in plaintiff's favor for $1,000.00, and this appeal followed.

The record discloses that the defendant had claimed $1,[illegible] for delivery of lumber, and as of [illegible] per thousand feet and not exceed of $[illegible] per thousand feet. Plaintiff testified that he paid this lumber to his workmen the lumber-and-body working company at $[illegible] per thousand feet, and that the latter refused to accept it, claiming that the lumber

was mere kindling wood; that plaintiff had paid for the lumber in advance $1477.68; that when the Elaborated Ready Roofing Company refused to accept the lumber, it was then turned over to one A. August. There is considerable dispute in the testimony as to whether August paid anything for the lumber. Plaintiff testified that when he made the purchase of the lumber, the defendant's representative said it was new lumber. This was denied by the defendant, whose representative testified that at the time of the sale he advised plaintiff that it was second hand lumber. Plaintiff further testified in his own behalf that the fair cash market value of lumber such as he purchased from the plaintiff was $32.00 per thousand feet in Chicago.

When the defendant was putting in its defense, counsel for the defendant asked a witness, who was the representative of the defendant, what was the fair cash market value of new lumber such as it sold plaintiff at the time of the sale. An objection was made to this question and sustained by the court. Counsel for the defendant at this time stated: "He is trying to prove by him what new lumber was worth."

We have given careful consideration to all of the evidence in the record, and it is perfectly apparent that all the facts were not brought out on the trial, and this no doubt resulted from the fact that there was haste in the trial of the case; counsel endeavoring to dispose of it within one hour. We have not discussed the evidence in detail, or the contentions made, because we have reached the con-

was more startling would that plaintiff had paid for the lumber in advance. Surely, day after day the diligent hard working German refused to pay the lumber, it was his own money part of one A. Vogel. There is considerable discussion in the testimony as to whether Aumann and anything for the lumber. Plaintiff testified that when he made the purchase of the lumber, the salesmanship representative said it was his own lumber. This was denied by the defendant, whose representative testified that at the time of the sale he advised plaintiff that it was Aumann lumber. Plaintiff further testified in his own behalf that the fair and market value of lumber much as he purchased from the plaintiff was $8.00 per thousand feet in Chicago.

When the defendant was testifying in its behalf, counsel for the defendant asked a witness, who was the representative of the defendant, what was the fair and market value of the lumber such as it was plaintiff's to the time of the sale. An objection was made to this question and sustained by the court. Counsel for the defendant at this time stated: "He is trying to prove by his own lumber was worth."

In here plead defendant additionally to all of the evidence in the record, and it is positively asserted that if the lumber was brought out on the trial, and this defendant asserted that this lumber was burnt in the yard of the dealer, counsel contending to charge of it within one hour. He have not discussed the evidence in detail, or the contentions made, because we have reached the con-

clusion that there must be another trial where all the facts may be brought out.

It appears that after the lumber was refused by the Elaborated Ready Roofing Company, it was measured by both parties, but they entirely disagreed as to the number of feet in each car although both parties apparently were present at the same time.

We are unable to determine, from an examination of the evidence, whether plaintiff made a re-sale of the lumber to the Elaborated Ready Roofing Company, before or after he purchased it from the defendant, nor can we determine whether or not A. August actually paid any money for the lumber. In this state of the record, we think the case ought to be re-tried.

Plaintiff having testified that he purchased new lumber and that the fair market value of it was $32.00 per thousand feet, and the defendant having testified that the sale was of second hand lumber, then the court should have permitted the defendant to prove the market value of new lumber in Chicago at that time. This would be a circumstance directly bearing on the question as to whether new or second hand lumber was sold. And the court erred in refusing to permit the defendant to submit proof on this point.

Plaintiff makes the contention that the points raised by the defendant are not properly before us, because no propositions of law were submitted on the trial. It is now definitely settled that propositions of law serve no pur-

clusion that there must be another trial where all the facts may be brought out.

It appears that after the lumber was released by the Lumbermen's Mutual Company, it was accepted by both parties, but they entirely disagreed as to the number of feet in each car although both parties apparently were present at the same time.

In the matter to determine, from an examination of the evidence, whether plaintiff made a tender of the lumber to the Lumbermen's Mutual Company, before or after he purchased it from the defendant, nor can we determine whether or not A. Rogers actually paid any money for the lumber. In this state of the record, we think the case ought to be re-tried.

Plaintiff having contended that he purchased the lumber and that the fair market price of it was $22.50 per thousand feet, and the defendant having testified that the sale was of second hand lumber, then the court should have permitted the witnesses to prove the market price of new lumber in Chicago at that time. This would be a circumstance directly bearing on the question as to whether the or second hand lumber was sold. For the above reasons it returning to permit the introduction of which proof in this point.

Plaintiff makes the contention that the notice served by the defendants was not properly prior to, because no propositions of law were submitted on the trial. It is the politically settled law propositions of law serve no pur-

pose so far as this court is concerned. P. C. C. & St. L. Ry. Co. v. Chicago City Ry. Co., 300 Ill. 162; Rothwell v. Taylor, 303 Ill. 226.

Judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

none so far as this court is concerned. *L. C. L. A. Co. v. Co. Jo. v. Commr. Int. Rev.*, 100 Fed. 149; *Gardner v. Trust*, 200 U.S. 226.

Judgment of the Municipal Court of Chicago is affirmed and the cause remanded for a new trial.

SUPERIOR COURT AFFIRMED AND REMANDED.

TAYLOR, P.J., LAW DISSENTS, J. DUNNE.

28024
189 - 28024

(3516a)

CHESTER H. WRIGHT,
Appellee,

v.

JEWELL BELTING COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

232 I.A. 22

Opinion filed Dec. 26, 1923.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of Assumpsit to recover $663.59, which he claimed to be due him from the defendant for salary, commission and expenses. There was a verdict and judgment in favor of plaintiff for the amount he claimed due as commissions, viz. $609.54. Judgment was entered on the verdict and the defendant prosecutes this appeal.

The record discloses that for a number of years prior to July 7, 1919, plaintiff was employed as a salesman, selling oil and belting for the defendant, being paid for his service a salary and a commission or bonus; that about July 7, 1919, the defendant went out of the oil business, and thereafter was engaged only in the belting business, and on that date plaintiff and some other employes of the defendant, by an arrangement made by the defendant in their behalf, were employed by D. A. Stuart & Co., which company was in the oil business. Plaintiff was to receive a salary of $300.00 per month from that company. At that time it was agreed that plaintiff, in addition to working for Stuart & Co., might continue in the employ of the defendant in the sale of belting, for which he was to be paid by the defendant, a commission

12034

123 - 3DEA

CHARLES H. BLANK,

Appellee,

v.

LEWIS BUILDING COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

2321-22

Opinion filed Dec. 20, 1923.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit to recover $[illegible], which he claimed is due him from the defendant for salary, commission and expenses. There was a verdict and judgment in favor of plaintiff for $[illegible] for his claims and for counsel fees, viz. $[illegible]. Judgment was entered on the verdict and the defendant prosecutes this appeal.

The record discloses that for a number of years prior to July 7, 1919, plaintiff was employed as a salesman, selling oil and selling for the defendant, being paid for his service a salary and a commission on sales; that since July 7, 1919, the salesmen went out of the oil business, and thereafter was engaged only in the selling business, and on that date plaintiff and some other employees of the defendant, by an agreement made by the defendant in their behalf, were employed by G. A. Ehrmann & Co., which company was in the oil business. Plaintiff was to receive a salary of $[illegible] per month from that company. At that time it was agreed that plaintiff, in addition to working for Ehrmann & Co., might continue in the employ of the defendant in the sale of gasoline. The point to be met by the defendant, a corporation

of 5 percent. Under this arrangement plaintiff sold belting and belting sundries during the month of July, August, September, October, November and December, and shortly after the end of each month received from plaintiff a check in payment for his services.

It is plaintiff's contention that the several amounts received by him were not as much as he was entitled to, and this suit was brought to recover such difference.

On behalf of the plaintiff the evidence tends to show that prior to July 7, 1919, he had sold goods for the defendant to a number of different persons and corporations and had entered into written contracts with such persons and corporations. These contracts by their terms had not expired on July 7, 1919, but provided that the goods mentioned in them should be delivered by the defendant covering a period of several months thereafter.

Plaintiff testified that on July 7, 1919, when he entered into the new arrangement, a representative of the defendant told him that the defendant would pay him a commission of 5 percent on goods which plaintiff should thereafter sell for the defendant, and that it would also pay him a like commission on the goods delivered under the contracts which plaintiff had secured prior to July 7, 1919, and that the plaintiff should continue to call on such parties. He further testified that he thereafter did call on them.

James O. Gray, who represented the defendant in the making of the contract of July 7th, denied that he had told plaintiff that the defendant would pay him a commission on

of 3 years. Under this arrangement plaintiff sold building and building materials during the month of July, August, September, October, November and December, and shortly after the end of that month received from plaintiff a check in payment for his services.

It is plaintiff's contention that the payment remained received by him were not as much as he had anticipated he, and this suit was brought to recover such difference.

On behalf of the plaintiff the evidence tends to show that prior to July 7, 1919, he had made plans for the defendant to a number of different buildings and repairs and had entered into written contracts with such persons and corporations. These matters by plaintiff had not applied on July 7, 1919, but provided that the parties contemplated in them should be obtained by the defendant covering a period of several months thereafter.

Plaintiff testified that on July 7, 1919, then he entered into the new arrangement, a representative of the defendant told him that the defendant would pay him a commission of 2 percent on people which plaintiff should thereafter call for the defendant, and that if would also pay him a like commission on the jobs plaintiff obtained which plaintiff had started prior to July 7, 1919, and that the plaintiff should continue to call on such parties. He further testified that he obtained his call on them.

Since 6, July, the defendant the defendant in the spring of the contract of July 7th, denied that he had said plaintiff that the defendant would pay him a commission on

goods thereafter delivered under contracts entered into prior to July 7th, and which had not yet expired; and he was corroborated in this respect by another salesman, Slivinski, who was present at the time. But plaintiff testified that Slivinski had left Gray and himself alone and it was then that Gray told him he would give him commissions on goods delivered under old contracts. This was denied by Gray. The uncontradicted evidence, however, is that the defendant in paying the plaintiff each month, included commissions on goods delivered under the old contracts. But the defendant contends that such payments were made under a mistake of fact and introduced evidence to this effect. We think the question was clearly one for the jury and feel that they were entirely warranted in adopting plaintiff's version of the matter.

The evidence further tended to show that each month when plaintiff was given a check in payment for his services, he was at the same time given a "sales sheet" showing an itemized statement of the sales which plaintiff had made during the month; that the sales sheets were not totaled when plaintiff received them, but that he footed up the figures and computed his commission on such footings at 5 percent, and that there was a shortage in the amount of each check. Plaintiff's claim is based on the fact that the commission he received each month was not as much as the figures given to him by the defendant warranted.

Plaintiff produced the sales sheets on the trial and testified that they were given to him by the defendant. A witness for the defendant testified that he had charge of

goods warehouse contained under cartons entered into prior to July 7th, and which had not yet emerged, but he was corroborated in this respect by another witness, Alistair, who was present at the time. Mr Malcolmit testified that Stalwart had left Troy and himself alone and it was then that Troy told him he would give his co-plaintiff on goods delivered under off-cartons. This was denied by Troy. The uncorroborated evidence, however, is that the defendant in paying the plaintiff such sums, included commissions on goods delivered under the off cartons. But the defendant contends that such payments were made under a mistake of fact and introduced evidence to this effect. He thinks the mistaken had clearly due to the fact and that Troy was entirely mistaken in admitting plaintiff's version of the matter.

The evidence further tended to show that when plaintiff was given a check in payment for his services, he was at the same time given a "sales ticket" showing an itemized statement of the sales which plaintiff had made during the month; that the sales checks were not mailed then plaintiff received them, but were to be turned up the figures and compared his commissions on such foreign at 5 percent, to find there was a shortage in the amount of some check. Plaintiff's claim is based on the fact that the commissions he received each month was not as much as the figures given to him by the defendant warranted.

Plaintiff produced the sales checks on his behalf and testified that they were given to him by the defendant. A witness for the defendant testified that he had charge of

defendant's books and papers and that the sales sheets submitted by plaintiff were not in the witness' hand writing; that he did not know who had written them. Defendant's counsel argues that nowhere does it appear that plaintiff received the sales sheets from the defendant. We think this is clearly a misapprehension of the plaintiff's testimony. It is perfectly clear that the evidence offered on behalf of the plaintiff warrants the conclusion, and the only reasonable conclusion, that plaintiff received the sales sheets from the defendant.

Plaintiff further testified that shortly after he received each monthly statement and check, he complained to the defendant that the amount of the check was not sufficient; that defendant stated the reason of the shortage was that all of the goods sold, had not been delivered. This was denied on behalf of the defendant. But we think the evidence is clearly sufficient to sustain the finding of the jury.

As tending to show the several amounts paid by the defendant was correct, it offered in evidence pages of its books, and a witness testified that they were correct. Such books tended to show that plaintiff received all that was due him, but the jury apparently followed the amounts shown by the sales sheets and we cannot say that their finding is against the manifest weight of the evidence.

On January 13, 1920, the defendant handed plaintiff a check for $343.50, which contained the following: "Commissions in full and accrued and to accrue." Plaintiff never presented this check to the bank for payment. He re-

defendant's books and papers and that the sales shown entered by plaintiff were not in the witness' hand writing nor do she not know who had written them. Defendant's counsel argues that re-hard that it cheek that plaintiff received the sales shown from the defendant. In this case is clearly a misapprehension of the plaintiff's testimony. It is perfectly clear that the witness stated on behalf of the plaintiff returned the commission, and the only reasonable conclusion, that plaintiff received the sales sheets from the defendant.

Plaintiff further testified that shortly after he received said monthly statements and sheets, he protested to the defendant that the amount of the commission was incorrect; that defendant stated that the money at his disposal was that all of the sales sold, but not been delivered. This was denied on behalf of the defendant. But on this the evidence is clearly sufficient to justify the finding of the jury.

As bearing on this the assignments said on the defendant was correct, it offered in evidence pages of the book, and a witness testified that they were present. Such books tended to show that plaintiff received all that was due him, but the jury apparently rejected the accounts shown by the sales sheets and so should by this last finding be satisfied the counter claim of the defendant.

On January 14, 1920, the defendant issued plaintiff a check for $147.60, which contained the following: "Commissions in full and received and to account." Plaintiff never returned this check to the bank for payment. He re-

tained it for about two months. Defendant, while plaintiff held the check, ordered payment of it stopped, and afterwards instructed his bank to pay it. Later on, at the end of about two months, plaintiff at the defendant's request, returned the check to it, and it has never been paid. There is considerable discussion in the briefs as to whether plaintiff knew when he was given the check that the words above quoted appeared upon it. And there is a great deal of argument in the briefs that the action of plaintiff in accepting the checks for the several months, and particularly in taking the check for the amount for December and retaining it for about two months, constituted accord and satisfaction. It is obvious that plaintiff having returned the check which was handed him for the amount due in December, at the defendant's request, and the same never having been paid him, there was not an accord and satisfaction.

It is clear that the plaintiff by accepting and cashing the checks for the several months, has not estopped himself from saying that he had not received all that was due for those months.

The testimony submitted in behalf of the plaintiff is to the effect, that when he received the checks for each of the months up to the last one, he complained of the fact that there was a shortage, and that Gray's position on various occasions was, not that the checks covered the full amount that was coming to the plaintiff, but that the discrepancy which the plaintiff was claiming was due to the fact that the goods called for by some of the sales had not been delivered. While it is true that this matter is the subject of conflicting testimony, the above is the plaintiff's theory and is supported by his

Bonner is now signed by another. Defendant, while claiming that the notes, without regard to its signature, and either verbally instructed the bank to pay it. Under ch, as the case of Bonner v. Gordon, plaintiff as the rightful owner, received the money to it, and it was never paid. There is considerable disagreement as to the effect of the further claimant from the plaintiff that the notes above mentioned could it. But there is a great deal of evidence in the record that the matter of plaintiff in connection the issues for the jury's consideration, and particularly in view of the remark for instance not requiring it for them to decide conclusively upon the satisfaction. It is obvious that claim will having received the money which was needed his for the amount due in accordance, as the defendants received, and the bank after having been paid it, there can be no doubt of satisfaction.

It is clear that the liability by endorsing and cashing the checks for the several creditor, for his accounts plaintiff from saying that he had not authorized all that was due the bank months.

The testimony concerning in behalf of the plaintiff is to the effect, that when the receipts was shown for each of the checks to the last man, he questioned if the last date there was a discount, and that Taylor replied in another conversation, and that the bankers proved the fact account that was coming to the plaintiff, but that the discrepancy which the plaintiff had claimed was due to the fact that he made notes for by each of the notes had not been delivered. This is in line with your order in the majority of conflicting testimony, the issue in the plaintiff's favor was in conjunction by the

testimony, and the finding of the court was to that effect, and as elsewhere stated, we are unable to say, from the testimony in the record, that such finding is against the manifest weight of the evidence.

When plaintiff offered the sales sheets in evidence, it was objected that, since after plaintiff had examined them, and they did not refresh his recollection, he could not testify from them. Plaintiff's contention is that the record discloses that plaintiff's recollection was refreshed by his examination of the sheets, and therefore, they were admissible in evidence. The argument made by both sides in this respect has no application to the point under consideration. Plaintiff was not endeavoring to refresh his recollection from the sheets. He testified he received them from the defendant, and that all that he had done was to foot up the amounts and compute the 5 percent shown upon such amounts. Under this testimony, the sheets were clearly admissible; the evidence tending to show that they were made out by the defendant and given to the plaintiff. On the trial both counsel made substantially the same argument that they make in this court, apparently confusing the trial judge, but the ruling of the court admitting them in evidence was entirely proper for the reason stated.

Plaintiff's suit was commenced April 16, 1920 and on July 22nd of that year, he filed an itemized bill of particulars, showing in detail the amount he had received each month, the amount he claimed and the amount of the sales. On August 6, 1930, the defendant filed a plea of general issue. The case went to trial on May 24, 1932, and during the trial

testimony, and the finding of the court was to that effect, and as elsewhere stated, we are unable to say, from the testimony in the record, that such finding is against the manifest weight of the evidence.

When plaintiff offered the sales sheets in evidence, it was objected that, since after plaintiff had examined them, and they did not refresh his recollection, he could not testify from them. Plaintiff's contention is that the record disclosed that plaintiff's recollection was refreshed by his examination of the sheets, and therefore, they were admissible in evidence. The argument made by both sides in this respect has no application to the point under consideration. Plaintiff was not endeavoring to refresh his recollection from the sheets. He testified he received them from the defendant, and that all that he had done was to fact up the sheets and compute the 3 percent upon such amounts. Under this testimony, the sheets were clearly admissible, the evidence tending to show that they were made out by the defendant and given to the plaintiff. In the trial both counsel made substantially the same argument that they made in this court, apparently conceding the total jumps, but the ruling of the court admitting them in evidence was entirely proper for the reason stated.

Plaintiff's suit was commenced April 16, 1930 and on July 22nd of that year, he filed an itemized bill of plaintiff, showing in detail the amount so had received each month, the amount he claimed was the amount of the sales. On August 6, 1930, the defendant filed a plea of general issue. The case went to trial on May 26, 1932, and during the total

defendant was given leave to file a plea of setoff. In this plea defendant claimed that he had paid plaintiff $588.08 more than he was entitled to under a mistake of fact, viz: that defendant had paid commissions on the contracts which plaintiff had obtained prior to July 7, 1919. Defendant offered testimony tending to show that such payments were made under a mistake of fact, and offered in evidence the several contracts obtained by the plaintiff prior to July 7, 1919. Upon objection these were excluded and the defendant contends this was error. The defendant does not point out, however, in what respect these contracts would aid the jury in determining the question. We have examined the contracts in the record and it is clear that they were properly excluded. They did not indicate in any way what plaintiff was to receive for obtaining the contracts. They are simply contracts entered into by defendant with certain of its customers for the sale of certain goods, covering certain periods of time. Plaintiff's contention was that he was entitled to commissions for goods delivered under these old contracts solely by virtue of the oral agreement entered into by him with the defendant on July 7, 1919.

Defendant contends that it was error to admit in evidence two letters written by plaintiff to the defendant, one dated January 29th and the other February 4, 1930, on the ground that they were self-serving declarations made by the plaintiff. The letter of January 29th advised defendant that plaintiff, in examining defendant's statement of the December sales and the check for $243.50 sent in payment of his commissions for that month, had found that this was not

Defendants was given leave to file a plea of nonjoinder. In this plea defendants claims that he had been plaintiff's employee more than one year prior to the institution of the suit, that defendant had paid workmen's compensation to the employee which plaintiff had obtained prior to July 7, 1919. Defendant offered testimony tending to show that such payments were made under a mistake of law, and offered in evidence the several contracts obtained by the January 7 prior to July 7, 1919. Upon objections these were excluded and the defendant nonsuited this was error. The defendant does not point out, however, in what respect these contracts would aid the jury in determining the question. We have examined the contracts in the record and it is clear that they were incomplete contracts. They do not indicate in any way with reasonable certainty and in detail for obtaining the contracts. They are simply contracts entered into by defendants with certain of the employees for the sale of certain goods, covering certain periods of time. Practically construction was left to the workmen to manufacture the goods delivered under those old contracts subject to return of the goods agreement entered into by the with the defendant on July 7, 1919.

Defendant contends that is the error in that in evidence the letters written by plaintiff to the defendant, one dated January 8th and the other February 6, 1920, in the ground that they were self-serving declarations made by the plaintiff. The letter of January 8th contained defendant that plaintiff, in avoiding defendant's employment of the Swedish walk and the debt for 1920, by such improvement of his consideration for that month, and found that this was not

all the money that was due him.

In this letter the plaintiff further referred to the fact that he had received a list of sales for each month which he had assumed to be correct, and then he reminded Gray that he had informed him several times that these sales lists and the checks he had been receiving from month to month, did not correspond; the check being for a less amount than he claimed to be due; and that Gray had explained this by saying that this was probably due to the fact that the goods called for by certain sales on the list had probably not been delivered. Having referred to the foregoing, the plaintiff then proceeded in the letter to give the shortage he claimed for each month in dollars and cents. He then made a request for a list of sales with customers names, for November and December and in the last paragraph of the letter, he says that he believes that Gray is not aware "of the wide discrepancy between sales sheets and my checks and that you desire to be fair and square in all things."

In other words, after testifying to the various conversations the plaintiff claimed to have had with Gray during the six months period on the subject of these monthly checks, the plaintiff introduced this letter to show the complaint he had made to Gray in writing about the December account between the parties and to show that he again called Gray's attention to the discrepancy, which he testified that he had previously talked over with Gray.

We are of the opinion that the letter was properly admitted, if for no other reason, to prove the notice the plaintiff claimed to have given Gray of his dissatisfaction

all the money that was due him.

In this letter the plaintiff further referred to the fact that he had received a list of notes for such money which he had secured to be correct, but that he (Smallwood) felt that he had informed him several times that these notes were not the notes he had been receiving from week to month, but had subsequently the notes being for a time because then he claimed to be lazy, but that they had neglected this by saying that this was probably due to the time that the people waited for to receive money on the list had probably not been delivered. During returned to the company, the plaintiff then proceeded to the trouble to get the statement he claimed for such money he believe he should. He then made a request for a list of notes with numerous errors, for number and amounts and in the last paragraph of the letter, he says that he believes that they is not room for two sides discrepancy between what appears to be correct and that you claim to be fair and honest in all things."

In other words, after complaining to the various conversations the plaintiff claimed to have had with Guy during the six months period on the subject of some monthly checks, the plaintiff introduced the letter to show the case plaintiff is had said to Guy in talking about the Jackson account between the writing and to show that he claim defend Guy's attention to the discrepancy, which he realized that he had previously talked over with Guy.

In one of the letters that the Estate has produced, if for no other reason, to prove the motive the plaintiff claimed to have given Guy of his dissatisfaction

with the December account, as well as to show that he was still maintaining the position he had previously taken as to the account covering previous months. The letter of February 4th was substantially to the same effect.

But one instruction was given on behalf of the plaintiff and it told the jury that if they believed from all the evidence that plaintiff was employed by the defendant upon a commission basis and that he was not paid all the commission due him, then the verdict should be for the plaintiff, in such sum if any, as the evidence showed was still due and unpaid. The defendant contends this instruction was wrong, in that it ignores the principle that the burden of proof was on the plaintiff to establish his case by a preponderance of the evidence. The instruction did not mention the question of the burden of proof but told the jury that before they could find for the plaintiff they must believe from all the evidence that plaintiff had not been paid all that was due him. Under the facts in the case we think the jury could not have been mislead by this instruction.

It is also complained that the court erroneously modified an instruction offered by the defendant upon the question of an accord and satisfaction. We think the instruction was not warranted at all, and should have been refused. By the giving of it, defendant was given the benefit of something it was not entitled to.

The judgment of the Circuit Court of Cook County

with the Secretary accounts, or risk in so doing that he may still maintaining the position he had previously taken as to the accounts covering previous months. The letter of February 4th was subsequently to the case filed.

But was instructions was given to counsel of the plaintiff not to tell the jury that if they believed from all the evidence that plaintiff was employed by the defendants upon a consideration basis and that he was not paid all the commissions due him, then the contract should be for the plaintiff, in spite of it by, or the evidence showed was still due and owing. The instructions this instruction was wrong, in that it ignores the principle that the burden of proof was on the plaintiff to establish his case by a preponderance of the evidence. The instruction did not mention the question of the burden of proof but told the jury that before they could find for the plaintiff they must believe from all the evidence that plaintiff had not been paid all that was due him. Under the facts in the case as which the jury could not have been misled by this instruction.

It is also contended that the court erroneously omitted an instruction offered by the defendant upon the question of an account and settlement. In view the instructions was not necessary at all, and should have been refused. By the giving of it, defendant was given the benefit of something it was not entitled to.

The judgment of the lower court of Cook County

is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

35 - 37855

(3517a)

THE BOND & MORTGAGE COMPANY,

Appellant,

v.

JOHN A. CRAWFORD,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

232 I.A. 52

Opinion filed Dec. 26, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the complainant company seeks to reverse a decree, sustaining the defendant's demurrer to the bill of complaint, discharging the receiver and dissolving the injunction (a receiver having been appointed and a temporary injunction having been issued on the filing of the bill) and dismissing the bill for want of equity. The defendant has filed no brief in this court.

The defendant Crawford became the owner in fee of the premises in question by warranty deed from one McShane. The latter had previously improved the premises with a thirty apartment building and in connection with that improvement he had made a loan of $125,000.00, to secure which he executed a trust deed conveying the premises in question to the Chicago Title & Trust Company as Trustee. This trust deed is set forth in full in the bill.

The principal of the loan secured by this trust deed was represented by an issue of bonds in varying amounts, coming due in successive years, over a given period. There were attached to these bonds coupons calling for the semi-

Opinion filed Dec. 26, 1922.

Mr. Justice Frankfurter delivered the opinion of the court.

By this appeal the defendant company seeks to reverse a decree, enjoining the defendants jointly in the full of complaint, discharging the receiver and dissolving the injunction (a receiver having been appointed and a temporary injunction issued ex parte upon the filing of the bill) and dismissing the bill for want of equity. The difficulties that claim our attention in this case.

The defendant contends that the court in the decree the premises in question by wrongfully dead from the defendant. The latter had previously leased the premises with a fifty apartment building and in connection with that improvement he had made a loan of $125,000.00, in return which he received a trust deed conveying the premises in question to the company title a trust company as Trustee. This trust deed is not duly in full in the bill.

The principal ground the lower court by this trust deed was terminated by an issue of bonds in varying amounts, coming due at successive years, each a given series. These were attached to serve bonds covering notice for the acceleration

annual payments of interest.

Among other things, the trust deed securing the bond issue provided that in case of default in the payments of principal or interest, then, on application of the legal holder of any one of the bonds, or in case of default for a period of 10 days in the performance of any other covenant of the grantor in the trust deed, then, on application of the legal holder or holders of 20 per cent of the outstanding bonds, the party of the second part to said trust deed, namely, the trustee, might take possession of the property and remove the party of the first part and retain such possession and collect the rents, and lease and manage the property, through its agents or attorneys, until such default as might have occurred had been made good, and any and all expenses incident thereto had been paid. It was provided that the foregoing provision, for taking possession of and operating the property, was to be considered cumulative, with the ordinary remedy of foreclosure and that upon default being made in any of the obligations entered into in the trust deed, and upon request in writing, from the holder or holders of any one or more of the outstanding bonds, it should be the duty of the trustee to institute foreclosure proceedings.

The party of the first part covenanted in said trust deed that until all the bonds secured thereby, together with the interest thereon, should be fully paid and satisfied, he would deposit with the Bond & Mortgage Company, or its agent, on or before the fourteenth day of each month, beginning with June, 1921, and ending with May, 1936, an amount equivalent to one-sixth of the next maturing interest payment upon all outstand-

annual payments of interest.

Among other things, the trust deed provides for bond issue proceeds that in case of default in the payments of principal or interest, then, on application of the bond holders of any one of the bonds, or in case of default for a period of 30 days in the performance of any other covenant of the mortgage in the trust deed, upon, or application of the legal holder on behalf of 50 per cent of the outstanding bonds, the party of the second part is to sell trust deed, namely, the trustee, right into possession of the property and remove the party of the first part and others from possession and operate the property, set aside and change the property, through its agents or attorney, shall and should be right have expressed but does not be good, and may not all ex- pense incident thereto be been said. In the contract that the mortgaging particular, the notice presented to the operating the property, was to be treated/and neglected, with the obligation of forbearance for that upon district being made in any of the obligations referred upon in the trust deed, and upon request in writing, from the holder or holders of any one or more of the outstanding bonds, it should be the duty of the trustee to institute foreclosure proceedings.

The party of the first part covenants in said trust deed that until all the bonds become matured, whether by the interest division, should be fully paid and satisfied, he would deposit with the bond & mortgage company, or its agent, on or before the fourteenth day of each month, beginning with June 1923, and ending with May, 1924, in equal equivalent to one-sixth of the next maturing interest payment upon all outstand-

ing bonds, and also an amount equivalent to one-twelfth of the principal installment of bonds next maturing. The latter provision was not to apply to the last installment of bonds to mature. The trust deed provided that for the purpose of better securing the performance of the covenant just referred to, and also the performance of all other covenants contained in the deed, to be performed by the party of the first part, the latter agreed from time to time to "transfer, assign and set over to said Bond & Mortgage Company, as agent of trustee hereunder, the rents, issues, and profits accruing under the leases made, or hereafter to be made, by the party of the first part, as lessor of the said premises or parts thereof". Following that provision, the party of the first part, by the terms of said trust deed, thereby irrevocably authorized and appointed said Bond & Mortgage Company his true and lawful attorney in his name and stead to collect all of the rents, issues and profits arising or accruing at any time under the leases, and to use such measures "as in the discretion of the said party of the second part" (the trustee) may be proper or necessary to enforce the payment or security of the rents, or to secure and maintain possession of the premises, or to fill any vacancies and to rent any portion of the property to any party at the discretion of the said Bond & Mortgage Company, thereby granting to the latter full authority to exercise any of the rights granted in said trust deed, without notice to the party of the first part.

After setting forth the terms of the trust deed, the bill of complaint alleged that the defendant Crawford had failed and refused to pay the complainant, Bond & Mortgage Co., the deposits provided for in said trust deed and that he was

ing bonds, but also an absurd contention to construction of the original instrument of bond and mortgage. The latter provision was not in which to the last instrument of bonds to mature. The court had provided that the payment at better securing the performance of the covenant just referred to, and also the performance of all other covenants mentioned in the deed, to be performed by the party of the first part, the latter argued from this, that "trustee", meaning not ever to mean Bond & Mortgage Company, as agent of trustee bondholders, the terms, language, and provisions covering under the deed, or hereafter to be made, by the party of the first part, as lessor of the said premises or parts thereof". Following this provision, the party of the first part, by the terms of said trust deed, thereby irrevocably authorized and appointed said Bond & Mortgage Company his true and lawful attorney in his name and stead to collect all of the rents, issues and profits arising or accruing at any time under the leases, and to use such measures "as in the discretion of the said party of the second part" (the trustee) may be proper or necessary to enforce the payment or security of the rents, or to secure the execution of the terms of the leases, or to fill any vacancies and to take any action of the premises, or to fill any vacancies and to take any action of the premises, or to do anything in the place of the said party of the first part, and Bond & Mortgage Company, trustee under said trust deed, thereby granted to the latter full authority to exercise any of the rights conferred in said trust deed, without being the party of the first part.

After setting forth the terms of the trust deed, the bill of complaint alleges that the defendants Theodore and Esther had failed to pay the amortizations. That a Mortgage Co., the corporate provided for in said trust deed and that he was

in default in the payment of the monthly deposits called for by the terms of the trust deed, both on account of the principal and on account of the interest; that by reason of such default the Bond & Mortgage Company had served notice on the tenants of the building, directing that they pay their rents to it; that Crawford, through his agents, F. J. Williams & Co. had notified the tenants that they were to pay the rents to said agents only and that the Bond & Mortgage Company was without any right to interfere with the management of said agents; that by reason of the action of the defendant and his agents, the Bond & Mortgage Co. had been unable to collect the rents; that the payment of these monthly deposits toward both the interest and the principal, as provided in the trust deed, constituted a trust fund for the payment of the principal and interest to become due on the bonds, and that the performance of the payment of these monthly deposits constituted an added security to the bond holders and was designed to prevent a foreclosure of the trust deed.

The complainant further alleged in the bill of complaint that the defendant Crawford had been requested to assign the leases on the different apartments in the building to the Bond & Mortgage Company, but that he had refused to do so; that the defendant was proceeding to collect the rents and converting the income therefrom to his own use, and if this was permitted to continue the property would depreciate in value as security for the bonds and necessitate a foreclosure, "thereby creating a hardship on said Bond & Mortgage Company"; that the latter had sold or caused to be sold, the entire issue of bonds and that a material representation was made in such sale,

is defects in the payment of the monthly dividends called for by the terms of the trust deed, both on account of the unclaimed and on account of the interest due by reason of such defects the Lord Bishop Company has served notice on the Lessees of the building, directing that they pay such sums to its Trust Company, during his course, F. G. William & Co. Ltd. initiated the Lessees that they fail to pay the rents to which such sums and that the Lord Bishop Company can already sue right to interfere with the management of said Lessees, that by reason of the action of the defendant and his agents, the Lord Bishop Co. had been unable to obtain the money that the payment of these monthly dividends amount over the interest due the principal, as required by the trust deed, constitutes a trust fund for the payment of the principal and interest to arrange due in the future, and that the commencement of the payment of these monthly dividends constituted an added security to the trust holders and was designed to prevent a foreclosure of the trust deed.

The complainant Bishop attempt to the bill of complaint that the defendant Trustees had been negligent in enforcing the terms on the different departments in the building to the Lord Bishop Company, but that in the interest to do so that the defendant was responsible to enforce the terms and demanding the income directly to the one and, and it is the position to maintain the property which depreciate in value as security for the debt and constitute a foreclosure, "therefore by creating a liability on said Lord Bishop Company; that the Trustee had said or neglected to do said, the entire income of bonds and that a material misrepresentation was made to such said;

to the effect that the trust deed provided for monthly deposits; that it was the duty of the complainant Bond & Mortgage Company to collect the said deposits monthly and thereby avoid a possibility of foreclosure; that the defendant Crawford had failed to make the deposits and that the complainant believes that by reason of such default "it will suffer irreparable injury by being compelled to purchase the entire issue of said bonds from the holders thereof, unless a receiver be appointed for said premises, to collect the rents, and the said Crawford be restrained by injunction, from in any way interfering with the collection thereof."

The Trust deed and also the bonds contained a provision to the effect that in case of default in the payment of either the principal or the interest on the bonds, the Bond & Mortgage Co. was to have the right to pay the amounts due on such defaulted bonds, out of its own funds, to the holders thereof andthat in such case said bonds should be deemed to have been purchased by the Bond & Mortgage Company and should become their property; and in case any such bonds were so acquired by the Bond & Mortgage Company, it should not be considered that the payment had been for the benefit of the mortgagor, and should not have the effect of paying or retiring said bonds, but that it should vest the Bond & Mortgage Company with all the rights, liens and privileges conferred upon the holders of such defaulted bonds.

As stated above, upon the filing of this bill, the trial court issued a temporary injunction, restraining the defendant Crawford and his agents from interferring with the complainant Bond & Mortgage Company in its management of the property, and the court also appointed a receiver. A few days

to the effect that the trust deed provided for monthly payments; that it was the duty of the complainant bond & mortgage company to collect the said monthly monthly and thereby avoid a possibility of foreclosure; that the defendants therefore had failed to make the payments and that the complainant believe that by reason of such default "it will suffer irreparable injury by being compelled to purchase the entire issue of mortgages from the bondholders deceased, unless a receiver be appointed for said premises, to collect the rents, and the said therefore be restrained by injunction, from in any way interfering with the collection thereof."

The Trust deed has also the usual covenant that a provision in the effect that in case of default in the payment of either the principal or the interest on the bonds, the bond & mortgage Co. was to have the right to by the mortgage the on such defaulted bonds, and of its own items, to the holders thereof coupons in such case said bonds should be deemed to have been purchased by the bond & mortgage Company for absolute ownership their property; and in case [illegible] any such bonds were so purchased by the bond & mortgage Company, it should not be considered that the payment had been for the benefit of the mortgagor, and should not have the effect of paying or satisfying said bonds, but that it should keep the bond & mortgage Company with all the rights, liens and privileges enjoyed by the holders of such defaulted bonds.

On August 20th, upon the filing of this bill, the trial court issued a temporary injunction, restraining the defendant Dowland and his agents from interfering with the complainant bond & mortgage Company in the management of the property, and the court also appointed a receiver. [illegible]

later the defendant filed his general and special demurrer to the bill, the ground of demurrer being that there was "no privity between the complainant and the defendant to enable the complainant to call upon the defendant for the payment of any sum until the maturity of the semi-annual interest and installments of principal * * * and then * * * upon surrender and cancellation of coupons and principal bonds", and that the complainant had not, by its bill, made out any title to the relief therein prayed for. After a hearing on this demurrer, the court dissolved the injunction order, discharged the receiver, sustained the demurrer and dismissed the bill for want of equity, for "want of necessary party complainant, it appearing on the face of the bill that the complainant named in the bill has no title to sue."

In our opinion, the trial court properly sustained the demurrer to the bill. By the provisions of the trust deed, as set forth in the bill of complaint, there was no power placed in the Bond & Mortgage Company to file a bill in equity to enforce compliance with the provisions of the trust deed, as to the making of monthly deposits by the mortgagor or his grantee, or to compel him to assign his leases to the said Bond & Mortgage Company. Under the provisions of the trust deed it would seem to be clear that in the event of such a default on the part of the defendant, as is complained of in this bill of complaint, it was incumbent upon the trustee, upon written request preferred by 20 per cent of the outstanding bonds, to file a bill in equity for foreclosure of the bonds. Thus the trust deed makes sufficient provision for the taking of appropriate action by the trustee to protect the bonds, in the

Later the testator filed his general and special legacies in the will, the ground of demurrer being that there was "no privity between the complainants and the defendants in equity the defendants to will upon the testator for the payment of any sum until the maturity of the remainder interest and interest-bearing at principal * * * and from a upon authority and consideration of common and ultimate benefit", but that the complainant had not, by the bill, made out any claim to the valid trusts proper for. After a hearing on this demurrer, the court dismissed the complaint order, indorsed the demurrer, sustained the demurrer and dismissed the bill for want of jurisdiction, the "ground of controlling party complainant, if interesting in the form of the bill that the complainant cannot be the bill has no title to sue."

In our relation, the trial court properly sustained the demurrer to the bill. In the particulars in the trust deed, as set forth in the bill at complaint, there was no power placed in the trust & testator tending to file a bill in equity to enforce compliance with the provisions of the trust deed, as in the nature of mortgage requires in the instrument or the process, as to compel him to assign his interest or his mortgage-to-the plaintiff. Under the provisions of the trust deed it would seem to be plain that in the event it took a decision on the part of the defendant, in a complainant or in this suit of complaint, in the instrument upon the trustee, upon written request contained by 20 per cent of the outstanding notes to file a bill in equity for foreclosure of the debts. Thus the trust deed makes sufficient provision for the taking of appropriate action by the trustee to protect the bonds, in the

event of a default by the defendant of such a covenant as the one calling for the making of the monthly deposits, and nowhere does it give the Bond & Mortgage Company the right, in such an event, to file a bill.

For the foregoing reasons the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P. J. AND O'SONNOR, J. CONCUR.

event or a defaulter by the contractor of such a warrant or the one calling for the notice of the hearing therein, and whenever does in fact the bond a surety on the right, to sue on event, to file a suit.

For the foregoing reasons the decree of the trial court is affirmed.

AFFIRMED.

TAYLOR, P. J. AND PEDERSEN, J. CONCUR.

121 - 37955

(357)

ALBERT T. PETERSON,

Appellee,

v.

MAX WOLINETZ, et al on appeal of MAX WOLINETZ,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

232 I.A. 623

Opinion filed Dec. 26, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

The complainant Peterson filed his bill in equity against the defendant Wolinetz, alleging the existence of a partnership between the parties to deal in land for speculation purposes, and alleging further that as a result of this agreement a certain piece of land, improved with a three flat building, had been purchased and a title taken in the name of one Hedrick; and it was further alleged by the complainant in his bill, that by the terms of this partnership agreement this piece of property was to be re-sold and there was to be a division of the profits between the parties, in equal parts, the complainant paying out of his share of the profits all the expenses of the re-sale. It was further alleged that at the time of the filing of the bill the title to the piece of property in question was in the defendant's name and that he refused to agree to re-sell it and denied that he had entered into any partnership agreement with the complainant. The answer filed by the defendant denied all the allegations of the bill of the complainant. The testimony submitted by the respective parties was heard by the chancellor in open court and

AUGUST 1, 1926.

Appellee,	Action from Monroe County.
v.	Cole Circuit.
Del Valdez, as at one record of Del Valdez,	
Appellant.	

Opinion filed Dec. 26, 1925.

ab. Action thereon relative the erection of the court.

The appellant Valdez filed his bill in equity against the defendant Gilmore, alleging the existence of a partnership between the parties for such an land for operation purposes, and alleging further that in a search of this agreement a certain piece of land, improved with a three flat building, had been purchased and a title taken in the name of one brother; and it was further alleged by the complainant in his bill, that by the terms of this partnership agreement this piece of property was to be sold and the money was to be a division of the profits between the parties. In their proofs, the complainant proved the partnership, in order with the requirements of the statute. It was further alleged that at the time of the filing of the bill the title to the piece of property in question was [illegible] in the defendants name but that be refused to agree to transfer it and denied that it was subject to any partnership agreement with the complainant. The answer filed by the defendant denied all the allegations of the bill of the complainant. The testimony adduced by the respective parties was taken by the chancellor in open court and

a decree was entered finding all the issues for the complainant, making numerous findings of fact, in which the facts were found to be as alleged in the bill of complaint, and the decree directed that the property be re-sold and that the net proceeds be divided between the parties, in accordance with the terms of the partnership agreement . To reverse that decree the defendant has perfected this appeal.

It would serve no useful purpose to set forth even the substance of the evidence in this opinion. The complainant testified to the existence of the partnership agreement, which he alleged existed between him and the defendant and after testifying about the refusal of the defendant to carry out the terms ofthat agreement, he testified further that he wrote out what he conceived to be the substance of the agreement, and took it to the defendant and read it to him, and he then testified that the defendant said that this written statement was correct and that it set forth their agreement, whereupon the complainant asked the defendant to sign it and the latter said that he would do so but he wanted one, Walker, who was a lawyer and a friend to both the parties, to look it over. The plaintiff testified to subsequent efforts to get the defendant to sign this written statement, and that he never would do so. The complainant procured parties who were willing to buy the property at a profit to him and the defendant but the defendant refused to convey, first on the ground that there was not enough cash involved in the deal, and finally that he had concluded to keep the property and live in a portion of it.

The complainant was corroborated in material parts of his testimony, going to show the substance of the oral part-

a decree was issued finding all the issues for the complainant, ruling numerous functions of laws, in which the State was found to be eligible in the sell of monopolies, and the decree directed that the property be forfeit and that the proceeds be divided between the parties, in accordance with the terms of the partnership agreement. No appeal was decree the defendant has perfected this appeal.

It would serve no useful purpose to set forth here the substance of the evidence in this episode. The complaint was satisfied in the relations of the partnership agreement, which is alleged existed between the and the defendant was later testifying about the reluset of his testimony to prove his the terms offset agreement, he testified further that he would not not be associated in or the endeavoure of the agreement, and that it to the defendant and read it to him, and he then testified that the defendant said that this evidence statement was correct and that it was their entire agreement, whereupon the complainant asked the defendant to sign it but the defendant said that he would do so but to number one, Sidney, the son a lawyer and a friend to both the parties, to read it over. The plaintiff testified to conversations between to get the defendant to sign this written statement, but this is never would to so. The complainant testified further that he never signing to be the property as a profit to him and the defendant had the exclusive rights to sell. Just on the ground that there was not enough capital in the case, was clearly that is not required to keep the property and life of a partner at it.

The complainant was corroborated in material point of his testimony, going to show the existence of the oral part-

nership agreement between him and the defendant, by the testimony of Walker and also by that of Hedrick, who was also a friend of both parties and who took the title at their suggestion, and who, at the same time executed a deed of the property to the defendant, which deed was placed in the defendant's hands with the understanding that he was not to record it unless something happened to Hedrick. He later did record it, apparently from the testimony in the record, contrary to the provisions of the understanding between the parties. The defendant testified in his own behalf, denying all the material parts of the complainant's testimony. He was not corroborated by any other witness.

Before the findings of fact of a chancellor in a decree, which has been entered after a hearing in open court, will be set aside as against the weight of the testimony, it must clearly appear that they were erroneous. In our opinion, that is not only not the situation in this case, but, on the contrary, the findings of fact set forth in the decree are clearly warranted by the preponderance of the evidence in this record. This includes the finding to the effect that a partnership existed between the parties with respect to the property in controversy.

The defendant contends that the trial court erred in admitting incompetent and immaterial evidence. We will assume that arriving at the conclusions reached, and in entering the decree, the chancellor took into consideration only such evidence as was material and competent. It should further be said that an examination of the record, as to all the evidence complained of by the defendant in this connection, has shown that there were no errors in connection with the rulings

[illegible] between him and the defendant, by the testimony of Father Hui also by that of Mackay, the [illegible] of both parties and who took the title as their witnesses, are who, at the same time exercised a [illegible] of the property in the defendant, which had been placed in the [illegible] with the understanding that he was not to [illegible] something happened in Dublin. In latter did [illegible] quite from the testimony in the record, [illegible] viewed of the [illegible] the [illegible]. The [illegible] testified in his own behalf, [illegible] parts of the complainant's testimony. He was not [illegible] by any other witness.

Before the rendering of such of a decision in a [illegible], which has been [illegible] when a [illegible] short, will be not [illegible] the weight of the testimony, it [illegible] clearly [illegible] opinion, that is not only [illegible] in this case, but, on the contrary, the [illegible] in this record are clearly [illegible] by the [illegible] of the witnesses in this record. This [illegible] the [illegible] in the [illegible] partnership [illegible] between the parties [illegible] to the property in controversy.

The [illegible] contends that the trial court erred in admitting [illegible] and [illegible] evidence. We will assume that [illegible] of the [illegible] method, and in [illegible] the [illegible], the [illegible] took [illegible] only such evidence as was material and [illegible]. It should further be [illegible] of the record, as in all the [illegible] considered of by the [illegible] in this [illegible], has shown that there were no errors in [illegible] the [illegible]

on the admissibility of the evidence, such as would warrant a reversal of the decree.

The defendant contends that an accounting should have been ordered, if the finding was to be for the complainant. With that contention we are unable to agree. We do not find from our examination of the record that any necessity for an accounting existed. The decree finds that the complainant produced a purchaser of the property in question, at a price which would have given the parties involved here a profit of $3750.00, and that the complainant made every effort to induce the defendant to consent to a sale of the premises at that price, and the court found that by this fact the complainant estopped himself from claiming more than one half of $3750.00,- the profit which would have been realized from the sale of the premises which the complainant had arranged and which he tried to induce the defendant to carry out. The decree does not direct the defendant to pay the complainant $1875.00 (that being the complainant's share of the profit of $3750.00) as the defendant contends, but rather, for the benefit of the defendant, the decree provides that the defendant may pay the complainant his share of the profits on the sale in question, namely $1875.00, within 30 days, and thereby relieve himself or the property in question from any further obligation so far as the complainant is concerned, but it provides further that if the defendant does not pay the complainant his share of the profits aforesaid within 30 days, the property shall then be sold and the profits divided between the parties in accordance with the terms of their agreement.

We find no error in the record and therefore the decree of the Superior Court is affirmed.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR. DECREE AFFIRMED.

on the admissibility of the evidence, such as could warrant a reversal of the issues.

The referees remarks that as mentioned above a have been proved, if the finding was to be for the respondent. With such conclusion we are wholly in agree. We do not find from our examination of the record that any necessity for an accounting exists. The decree finds that the complained petitioner's partnership of the accounting is unknown, by a price which we'd have given the surplus provided over a profit of $2750.00, and that the respondent made every effort to induce the petitioner to compromise to a sale of the premises at that price, but the court found that by this fact the complainant actually made obtaining better than the bid of $1750.00. The profit which would have been realized from the sale of the premises under the complainant's proposal and which he asked to impose the defendant to carry out. The decree does not direct the defendant to pay the complainant $1750.00 (that being the complainant's share of the profit of $3500.00) as the defendant contends, but rather, for the benefit of the defendant, the decree provides that the defendant may pay the complainant his share of the profits as the sale in question, namely $1750.00, which he says, and thereby relieve himself as the property in question from any further obligation to the complainant in accordance, but it provides further that if the defendant does not pay the complainant his share of the profits aforesaid within 30 days, the property shall then be sold and the profits divided between the parties in accordance with the terms of their agreement.

We find no error in the record and therefore the decree of the Superior Court is affirmed.

Filed: May 6, 1920. J. Sharp. Decree affirmed.

172 - 28007

(3517)

GEORGE NORTH,
Appellant,

v.

E. A. SCHNEIDER,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

2321.4 223

Opinion filed Dec. 26, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a suit in equity, begun by the complainant, North, as Treasurer of and at the direction of the members of Calumet Council No. 78, North American Union, against the defendant, Schneider, the predecessor of North in the office of Treasurer of that Council, by which suit it was sought to compel Schneider to make an accounting as to the funds in his hands at the close of his term of office as Treasurer of the Council.

At the expiration of his term, the defendant Schneider contended that the balance in his hands as Treasurer, belonging to the Council, was the sum of $334.57, which he tendered to the incoming Treasurer, North. But the latter claimed that this was not the correct amount and declined to receive the amount tendered. It was North's contention that there was a further sum of $453.05, for which Schneider was failing to account and which he ought to turn over as a part of the funds in his hands as Treasurer of the Council. The cause was referred to a Master where proofs were submitted, after which, the Master submitted a report the sub-

stance of which was to the effect that the amount, tendered by the defendant at the close of his term of office, was correct and that the further sum which was in dispute between the parties was not one for which the defendant should be required to account, as Treasurer of the Council, inasmuch as it had been dispersed by him, as Treasurer, in the regular way by proper vouchers issued by officers of the Council. A decree was entered, finding the facts in conformity with the findings of the Master and following the recommendation of the latter, the bill of the complainant was dismissed for want of equity. To reverse that decree the complainant has perfected this appeal.

It appears from the testimony in the record that during the term of office of the defendant Schneider, as Treasurer of the Council, there was formed among the membership of the Council what was known as the "Calumet Council 1918 Club". The object of this move was to increase the membership of the Calumet Council. At a meeting of the Calumet Council, held in the latter part of 1917, a resolution was passed providing for the organization of this 1918 Club, which contained some provision for paying the Club some funds from the treasury of the Council, to help finance a trip of the members of the Club, which seems to have been provided in the nature of a reward or prize for those of the members of the Club whose efforts resulted in an increase in the membership of the Council. The defendant became the Treasurer of this 1918 Club. The amount in question between the parties in the suit at bar, was the sum which he, as Treasurer of the Council, paid to himself as Treasurer of the Club, pursuant to the action of the Council above referred to, concerning the organization

stage of which was to be after that account, tendered by the defendant at the close of all here of either, was correct and that the latter was which was in dispute between the parties was not one for which the defendant should or required to account, as Treasurer of the Council, inasmuch as it had been disposed of him, as Treasurer, in the regular way by proper vouchers issued by officers of the Council. I decree was entered, finding the facts in conformity with the findings of the master and following the recommendation of the latter, the bill of the complainant was dismissed for want of equity. To reverse that decree the complainant has prosecuted this appeal.

It appears from the testimony in the record that during the term of office of the defendant Cornelius, as Treasurer of the Council, there was formed among the undergrads of the Council what was known as the "Alumni Council Club". The object of this group was to increase the usefulness of the Alumni Council. At a meeting of the Alumni Council, held in the latter part of 1917, a resolution was passed providing for the organization of this club, which contained some provisions for paying the dues from the Treasury of the Council, in order to keep a roll of the members of the club, which seems to have been popular in the nature of a row and of prize for those of the members of the club whose efforts resulted in an increase in the membership of the Council. The defendant became the Treasurer of this club. The income in question derived the writing in the book as he, was the one which he, as Treasurer of the Council, had to transfer as Treasurer of the Club, pursuant to the action of the Council above referred to, concerning the organization

of the Club within the membership of the Council and the provisions for the payment of some funds to the Club, by the Council, for the purpose stated.

There is considerable dispute as to what the terms of this resolution were. From the record it would seem that there were two copies of the alleged resolution before the witnesses on the hearing before the Master, which are referred to in the record as Exhibits 1 and 2. The first was not received in evidence and the second was. The minutes of the meeting at which the resolution was adopted did not include the resolution in full but merely recited that it was adopted and stated in very few words that is was about. The testimony in the record, on the question of this resolution, is rather unsatisfactory, but in our view of the case that is quite immaterial. The complainant contends that it was the defendant's position that the payment of the funds in dispute, by the latter, was passed upon and authorized by the resolution; that the findings of the Master and the decree of the court are not in accordance with the evidence as to what the terms of this resolution were, and that, therefore, the decree should be reversed as being against the clear preponderance of the testimony. In our opinion the premise of this contention is incorrect. The defendant's position, as clearly indicated by his testimony in the record, is that the authority for the payment of the funds in question was not the resolution, but vouchers presented to him properly signed by the president and secretary of the Council. There seems to be no dispute between the parties that this 1918 Club was organized; that its object was to increase the membership of the Council and that the resolution in question made some provision for payment of funds out of the general

of the Club within the membership of the Council and the provisions for the payment of some funds to the Club, by the Council, for the purpose desired.

There is considerable dispute as to what the terms of this resolution were. From the record it would seem that there were two copies of the signed resolution before the witnesses on the hearing before the Board, which are referred to in the record as Exhibits 1 and 2. The first was not signed in evidence but the second was. The minutes of the meeting at which the resolution was adopted did not include the resolution in full but merely recited that it was adopted and stated in very few words what it was about. The testimony in the record, on the question of this resolution, is rather unsatisfactory, but in our view of the case this is quite immaterial. The Municipal Defendants claim that it was the defendant's position that the payment of the funds in question, by the latter, was based upon the understanding of the resolution; that the findings of the Court but the terms of the resolution are not in controversy with the exception as to what the terms of this resolution were, and that, therefore, the issues should be reversed as being against the more preponderance of the testimony. In our opinion the terms of this resolution is immaterial. The latter's position, as clearly indicated by its testimony in the record, is that the authority for the payment of the funds in question was not the resolution, but resulted automatically as the property signed by the president and secretary of the Council. There seems to be no dispute between the parties that this Club was organized; that its object was to improve the community of the Council and that the resolution is possibly only one provision for payment of funds out of the general

fund of the Council, to the Club, to partially defer the expenses of a trip to be taken by the members of the Club, whose efforts resulted in an increase in the membership of the Council, and this by way of a prize or reward for their efforts. There is a dispute as to whether the resolution provided that the Club members, in order to participate in the reward, were to procure one member or four members. We consider that quite immaterial, as well as all other differences between the parties, as to the exact terms of the resolution. The constitution and by-laws of the Union governing the Council, provided, among other things, that dues collected from the members were to constitute the general fund of the Council to be"used for the support and maintenance of the order and shall be subject to the order of the Council; provided, however, that no gift, donation, carrying of a member beyond the period allowed by law, or appropriation of or from the general fund of the Council other than for the fixed running expense thereof shall be made, except by the affirmative vote of three-fourths of all the members present voting by ballot thereon." It is the contention of the complainant that the sums paid out to the 1918 Club, pursuant to the resolution in question, could only be made under the terms of this by-law pursuant to an affirmative vote of three-fourths of the members present at some meeting, as shown by a vote taken by ballot,- therefore, that these payments were unwarranted, inasmuch as it is apparently conceded that there was no ballot vote on this resolution. In our opinion the by-law in question is not applicable to the situation presented, in this action by the representative of the Council against its former treasurer. It may be that by reason of this by-law the North American Union of which the Council was a part, might have the right to questio

Item of the Source I, to the City, by particularly voting the expenditure of a sum to be taken by the members of the Club, which objects resulted in an increase in the membership of the Council, and this by way of a price or reward for their efforts. There is a dispute as to whether the resolution providing that the City Auditor, in order to participate in the revenue, must be proprietor or factor of business. It remains that quite incidental, as well as other differences between the parties, be to the extent terms of the resolution. The contradiction in by-laws of the Union governing the County provided, among other things, that those affected from the members have to constitute the general fund of the Council to be used for the support and maintenance of the other and shall be subject to the order of the General; provided, however, that no gift, donation, carrying of a member beyond the prize allowed by law, or appropriation of time the general fund of the Council other than for the fixed running expense thereof shall be made, except by the affirmative vote of three-fourths of all the members present voting by ballot thereon." It is the contention of the members that the case pin out in the City Club, pursuant to the resolution in question, could only be made under the terms of this by-law pursuant to an affirmative vote of three-fourths of the members present at some meeting, as shown by a vote taken by ballot. Therefore, that those persons were nonmembers, inasmuch as it is apparently conceded that there was no ballot vote on this resolution. In our opinion the by-law in question is not applicable to the situation presented, in this respect by the representatives of the Council against its former treasurer. It may be that by reason of this by-law the sums American Union of which the Council was a part, might have the right to provide

the Council's action. But, there are other provisions in the by-laws of the Council, affecting the treasurer, which are applicable. The by-laws provided that the treasurer is to receive from the collector all moneys which the latter collected from the members, and further, that the treasurer "shall pay all orders drawn on him by the president and attested by the secretary." The defendant testified that the funds in question, paid by him, as treasurer, to himself as treasurer of the Club of 1918, were authorized "by having the voucher presented to me, signed by president and secretary". We do not find that that is anywhere disputed in the record. That being the case, the defendant's action, with reference to these funds, was entirely regular, at least as between him and the Council.

The complainant contends that error was committed in overruling his objection to testimony submitted in behalf of the defendant giving the substance of the custom which had prevailed at the meetings of the Council, in connection with the making of provision for payments out of the general fund, and also that error was committed in certain rulings as to testimony covering the subject-matter of the resolution, to which reference has been made, and also in refusing to permit complainant to examine the defendant on the question of whether or not the funds here in dispute were still in the hands of the treasurer of the Club of 1918, at the time the complainant, having been elected to succeed the defendant as treasurer of the Council, demanded that these funds be turned over to him as such treasurer. In our opinion, there was no

by Council's act is. But, there are other provisions in the by-laws of the Council, affecting the treasurer, which are applicable. The by-laws provided that the treasurer is to receive from the solicitor all moneys which the latter collected from the members, and further, that the treasurer "shall by all means keep on his by the president and elected by the secretary." The defendants testified that the funds in question, paid by him, as treasurer, to himself as treasurer of the Club of 1918, were authorized "by having the vouchers presented to me, signed by president and secretary". It is not that this was in anywise direct in the record. That being the case, the defendant's evidence, with reference to these funds, was entirely inquiry, at least in matters his and the Council.

The complainants contend that after the defendants in correcting his objection to receiving evidence in regard of the referred giving the secretary of the Club which had provided it the receipts of the Council, in connection with the making of receipts for payments out of the general fund, and also that error was committed in receiving evidence as to testimony covering the subject-matter of the resolution, to which reference has been made, and also in refusing to permit complainant to question the defendant on the question of whether or not the funds here in dispute were still in the hands of the treasurer of the Club of 1918, at the time the complainant, having been elected to succeed the defendant as treasurer of the Council, demanded that same from the former and to his no such treasurer. In our opinion, there was no

error as to any of these matters. Moreover, our view of the case being as above set forth, these matters become immaterial.

For the foregoing reasons the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

either are to say of those cultures. Moreover, our view of the case relying on short-run costs, these matters become immaterial.

For the foregoing reasons the decree of the Circuit Court is affirmed.

MOVED AFFIRMED.

PATRICK, V.J. and O'CONNOR, J. concur.

28018
183 - 28018

(3520)

DEALERS SECURITY CORPORATION, trustee, for the use of Dealers Security Corporation and the S. & E. Powdered Sugar Company, (Plaintiff)

Appellant,

v.

MICHIGAN AUTOMOBILE INSURANCE COMPANY, a corporation, (Defendant)

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

232 I.A. 223

Opinions filed Dec. 26, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

This action was brought by the plaintiff to recover the value of a Ford car owned by the S. & E. Powdered Sugar Company, which was stolen while it was covered by the policy of theft insurance, issued by the defendant Insurance Company. The value of the car was $375.00.

The Dealers Security Corporation was engaged in the business of financing the purchase of automobiles. The defendant issued to that corporation an open policy of automobile insurance covering loss by theft, on all cars in which the corporation might become interested by way of a mortgage. In accordance with the terms of that open policy, the defendant later issued its certificate to specifically cover the car in question, which was purchased by the Sugar Company, the purchase being financed by the Security Corporation.

Across the face of this certificate there was a paragraph entitled "LOCK WARRANTY", which paragraph read as follows:

MARINE SECURITY INSURANCE
STATES, for the use of Lloyds
Security Corporation and the S.
& E. Insured Super Company,(Plaintiff)

(Appellant,

v.

BIRDSONG LIVESTOCK INSURANCE
COMPANY, a corporation,(Defendant)

Appellee.

Opinions filed Dec. 16, 1969.

Mr. JUSTICE TRUSTON delivered the opinion of the court.

This action was brought by the plaintiff to recover the value of a yacht and owned by the S. & E. Insured Super Company, which the plaintiff alleged had perished as the result of their insurance, issued by the defendant Livestock Insurance Company. The value of the yacht was $[illegible].

The Lloyds Security corporation was engaged in the business of financing the purchase of yachts. The defendant had issued to such corporation an open policy of marine insurance covering loss by theft, on all boats in which the corporation might become interested in any of a mortgage. In connection with the issue of that open policy, the defendant later issued its certificate of principality cover the one in question, which was purchased by the Super Company, the purchase being financed by the Security Corporation.

Among the terms of this certificate there was a provision entitled "LOSS PAYABLE", which provided and as follows:

"In consideration of the reduction in premium granted for this insurance it is made a condition thereof that the insured will at all times maintain in working order on the automobile insured a locking device approved by the Underwriters Laboratories of the National Board of Fire Underwriters and bearing their label, and further that the insured will not leave the automobile without locking the device, for which allowance is made, otherwise this insurance shall be null and void as far as the theft of the automobile is concerned."

The sole question presented to the trial court, the case being heard without a jury, was whether or not the insured had committed such a breach of the foregoing warranty as to preclude a recovery under the policy by reason of the theft of his car. The trial court held that such a breach had been committed and accordingly gave judgment for the defendant. To reverse that judgment the plaintiff has perfected this appeal.

The evidence showed that one Syme was the sole owner of the Powdered Sugar Company. The car in question was equipped with a Decker wheel lock. The claim manager for the defendant company was asked whether that was the lock approved by the Underwriters and he replied that it was. The car in question was also equipped with an ignition lock, which this witness testified was a very simple lock. His testimony was to the effect that you can turn most any Ford lock with a pin or any kind of knife blade or anything else; that there is no protection as a lock. He also testified that he had driven Fords probably 50,000 miles and knew this from his experience with them. It appears further from the testimony that on July 18, 1931, the key of the Decker lock became bent in the lock, thereby making it impossible to lock the car with that lock. Syme continued to use the car in connection with his business, however, without having the lock fixed and on the evening of

"In consideration of the reluctance to grant
permit for this laboratory it is well a condition
covered that the permit will be all those suitable
in arriving either as the economic impact a loading
dredge anywhere on the Delaware. Laboratories of
the national board of fish commissioners and bearing
their label, not further that the labor will not
leave the laboratorists which I feel the device, by
which difference is made, otherwise this laboratory
shall be will not vest as for as the study of the
estuarine is concerned."

The case quickly presented to the trial court, the case being heard without a jury, not another at let for hearing has developed into a search of the investigation authority to establish a territory under his action by reason of the study of the law. The trial court has such a record has been committed not unnecessarily gave judgment for the defendant. In reverse that judgment the plaintiff has petitioned this appeal.

The evidence showed that was given the site the owner of the condemned dredge company. The are in question was equipped with a dredge equal land. The river bottom in the Delaware country was water stating that the land condemned by the laboratorists and be written this is yes. The war is question was also authorized with an legislative land, which the statute territial was a very simple law. The statutes was to the effect that you can have not any site land with a dam or any land of with state or authority stay, and shall be as provided in a land. In the statutes that to let taken from property the site also not have the from the condemnation site land. In express future time the condemnation of the it, land, the map of the larger land become well in the land. Hardly making it impossible to land the property that land. Upon condemned is the site is in condemning the laboratory. However, stations large the land that and in the property of

July 20, he left the car on Michigan avenue in the City of Chicago, locking the ignition lock, and went into a cafe to get his dinner. He left the car about 15 or 20 feet south of the entrance of the cafe and was in there about 15 minutes, and when he came out the car was gone. Syme testified that prior to the time the key became jammed in the lock he had always used it and had never left the car without locking it with this lock.

The clause of the policy here in question is in the nature of a promissory warranty. Both parties so regard it in their briefs. But the plaintiff contends that it "is not an absolute warranty in the nature of a condition precedent, one breach of which avoids the policy, but is obviously a continuing promise that the condition warranted will continue during the life of the policy"; and that the warranty was satisfied if there was a substantial compliance with its terms and that such a compliance is shown by the facts. We are unable to concur in that view of the case.

Citation of authorities is not needed in support of the general proposition that forfeitures are not favored in the law, nor of the further proposition that where ambiguous language is found in a contract of insurance the ambiguity will be given a construction most favorable to the insured. But where the parties enter into an express and plain insurance agreement that their contract will be considered as void or terminated unless certain specified conditions are complied with, the agreement will be construed by the same rules by which all agreements are construed. Aurora Fire Insurance Co. v. Eddy, 49 Ill. 106.

July 20, in left the car on Jackson avenue in the City of Gilmore, locking the ignition lock, and went into a cafe to get his dinner. On left the car about 12:30 to take searchlight the returns of the men and on to their homes in Gilmore, and when he drove off the car was gone. Upon testified that prior to the time the key became jammed in the lock he had always used it and always left the car standing in the ignition lock.

The claims of the policy here in question is in the nature of a preliminary warranty. Both parties to agree it is their intent. And the plaintiff contends that it is not to constitute warranty in the nature of a condition precedent, one breach of which avoids the policy, but is strictly a covenanting promise that the condition warranted will continue during the life of the policy; and that the warranty was satisfied if there was a substantial compliance with its terms and that such a compliance is shown by the facts. We are unable to concur in that view of the case.

Decision of authorities is not needed to support the general proposition that herein we are faced in the fact, one of the further propositions that where ambiguous language is found in a contract or insurance the ambiguity will be given a construction most favorable to the insured. But where the written words fail to express and clearly indicate agreement that their customer will be considered as void or terminated unless certain specified conditions are complied with, the agreement will be enforced by the same rights which all litigants are considered. Lorenz Fire Insurance v. Duty, 40 Ill. 108.

Many cases have been brought to our attention in the brief filed by counsel for the plaintiff. Some of them involve what is referred to as a trivial or temporary violation of a condition which is held not to have had the effect of avoiding the policy involved, such as Nash v. American Insurance Co., 188 Iowa 137. Some of them involve ambiguous phrases which were construed most favorable for the insured, under all the facts involved, such as King Brick Mfg. Co. v. Phoenix Ins. Co., 41 N.E. 277, in which the court construed the phrase "constant watch" and held that the requirement contained in the policy had been fairly and substantially complied with on the facts there presented. Other cases follow the theory of substantial compliance, such as Graff v. Liberty Ins. Co., 193 Pac. 356, in which the policy involved was issued to cover property in question only while occupied as a dwelling house, while it was shown that it was used also as an ice cream parlor in a very meager way. Still other cases, involve policies providing that they should become void if anything was done by the insured to "increase the hazard" or if the premises were used for any trade denominated as "hazardous" or "extra hazardous", in which the courts have held that an occasional use of premises for work that may be termed hazardous will not avoid the policy, but that in order to work a forfeiture by reason of a breach of such a warranty, there must be something in the nature of a continuous breach of the conditions recited in the clause containing the warranty. Westchester Fire Ins. Co. v. Foster, 90 Ill. 121. In our opinion, none of these lines of authority are applicable here. In determining the issues presented by the case at bar. consideration must be given to the exact terms of the promissory warranty found in the policy and to the facts shown by the

Many cases have been brought to our attention in which "lied by account for the plaintiff. Some of them involve that is warranted to be a fraud or conspiracy violation of a condition which is held not to have had the effect of avoiding the policy involved, such as Kirk v. Metropolitan Life Ins. Co., 128 Iowa 127. Some of them involve conduct on the plaintiff's part constituting waiver of the insurance, such as Blue Ridge Life Ins. Co. v. Phoenix Ins. Co., 42 S.E. 977, in which the court construed the phrase "accident policy" and held that the requirement contained in the policy had been fully met notwithstanding omissions with so too trivial consequence. Other cases follow the theory of constructive acceptance, such as Pratt v. Liberty Ins. Co., 130 Iowa 392, in which the policy involved was issued to cover property in question only while occupied as a dwelling house, only it was shown that it was used also as an ice cream parlor in a very modest way. Still other cases, leaving policies providing that the insurance became void if occupying was done by the insured in "increasing the hazard" or if the property was used for any other purpose as "business" or "extra hazardous", or which by express terms held that no consideration was of greater for more than one be varied hereunder will not avoid the policy, nor even be under is work a forfeiture by reason of a breach of such a warranty, there must be something in the nature of a continuous breach of the conditions required in the clause constituting the warranty. Phoenix Ins. Co. v. Conner, 90 Ill. 314. In one opinion, some of these 'lines of authority are distinguishable here. In determining the issues presented by the most of the decisions mentioned must be given in the right terms of the insurance actually found in the policy and in the facts shown in the

evidence.

In substance, the plaintiff warranted that he would at all times maintain in working order, on his automobile, a locking device approved by the Underwriters Laboratories of the National Board of Fire Underwriters and bearing their label, and further, that he would not leave the automobile without locking the device referred to, otherwise, the policy was to be considered null and void so far as the theft clause was concerned. In our opinion the evidence shows that there was such a breach of the provisions of that warranty as to prevent the plaintiff's recovery. The evidence shows that the plaintiff's car was equipped with a Decker lock and that that lock was approved by the Underwriters but it was not maintained in working order by the plaintiff. It would seem from the evidence that there was not even a substantial compliance with this warranty. It had been out of use for three days and during that time the car had been used by the plaintiff about the streets of the city and left standing, sometimes within his vision and sometimes not. The only reason he gives for his failure to have the lock fixed, as soon as the key became jammed in it, was that he had been too busy. There is no room here for a construction of substantial compliance. Either the automobile had an approved locking device on it or it had not. It might as well have been without any such device at all, as to have one which was useless, so long as it remained in that condition. But further, under the provisions of this warranty, the plaintiff could not recover, if his car was stolen after he had left it without locking this device, even if the car was equipped with an approved device in good working condition. That is the plain

evidence.

In summary, the plaintiff's contention that he was at liberty to withdraw materials in dispute, either, in his judgment, a locking device imposed by the laboratories authorities or the technical terms of their contractual obligations, not further, that he would not have the authorities citing lawful the device referred to, otherwise, the pledge was to be unilateral but not that of the party giving and accepted. In our opinion the evidence shows that there was such a breach of the contract of that authority on the part of the plaintiff's company. The evidence shows that the plaintiff's car was equipped with a device lock and that that lock was removed by the laboratories but it has not established in finding order by the plaintiff. It would seem from the evidence that there was not even a substantial compliance with this requirement. It has been not of one for three days and during that time the car has been used by the plaintiff where he attempts to do so. Only the lock equipment without the plaintiff and authorized act. The only reason to give for the failure to have the lock, is same as the key because present in it, one must be put back the key. There is no case here the a construction of unnecessary evidence. Either the authorities are to removed locking device or it or it has key. It might as well have been with-out any key at all. Only at all, he is held not right the contract, so long as it remained in that condition. At trial, after the operations of this property, the plaintiff could not recover, if his car was stolen after he had left it without locking this device, even if he had not was equipped with an approved device in good mechanical condition. That is the trial

stipulation in the policy. That it is a reasonable provision, is not controverted. It is a reasonable and proper protection for the insured as well as for the insurer. But the plaintiff points out that the evidence shows that this Ford car was equipped with an ignition lock, which was locked at all times, which is sufficient to make out a substantial compliance with the terms of the warranty, inasmuch as there is nothing in the record to show that the ignition lock is not one which is approved by the Underwriters. Plaintiff contends that the question involved is one of the performance of a condition subsequent, and therefore that the burden was on the defendant to show that the ignition lock was not so approved. In our opinion the provision of the policy, here involved may not properly be considered as a condition or proviso but rather as an express warranty, and, being such, the burden of making out at least a prima facie case, showing compliance with the terms of that warranty, was upon the plaintiff. While the burden of proving compliance with the terms of the warranty rests upon the assured, only prima facie proof would be required in the first instance and until rebutted. Joyce on Insurance, Vol. 3, sec. 1977; McLoon v. Commercial Mutual Ins. Co., 100 Mass. 472; The Aurora Fire Ins. Co. v. Eddy, 43 Ill. 106. In the latter case the policy of insurance involved contained a clause in which it was "expressly agreed that the assured is to keep eight buckets filled with water, on the first floor where the machinery is run, and four in the basement, by the reservoir, ready for use at all times in case of fire." It was held that this could not be considered as a condition, but should rather be considered as an express agreement or warranty, on the part of the assured, and that while the latter would not be held to a literal compliance, such as

stipulation in the policy. That it is a reasonable provision, is not contested. It is a reasonable and proper protection for the insured as well as for the insurer. But the plaintiff points out that the evidence does not show that this term was complied with on lighting land, which was located at all times, which is sufficient to make out a substantial compliance with the terms of the warranty, inasmuch as there is nothing in the record to show that the lighting land is not one which is approved by the insurers. Plaintiff contends that the question involved is one of the performance of a condition precedent, and therefore that the burden was on the defendant to show that the lighting land was not so approved. In our opinion the provision of the policy, here involved can not properly be considered as a condition or proviso but rather as an express warranty, and, being such, the burden of making out it breach is upon the defendant, showing noncompliance with the terms of that warranty, was upon the plaintiff. Thus the burden of proving compliance with the terms of the warranty rests upon the assured, only Kelly Field cases would be required in the first instance and until rebutted. Ogden on Insurance, Vol. 3, sec. 1277; Kelly v. Commercial Mutual Ins. Co., 100 Mass. 478; The Aurora Fire Ins. Co. v. Eddy, 55 Ill. 228.

In Whitaker case the policy of insurance covered machines a clause in which it was "expressly agreed that the machine is to carry night bombs filled with water, on the first flight there the machinery is not, and then in the beginning, of the reasonable, ready for use at all times in case of fire." It was held that this could not be considered as a condition, but should rather be considered as an express agreement or warranty, on the part of the assured, and that while the latter could not be held to a literal compliance, such as

keeping the buckets filled with water during freezing weather, yet it would be incumbent on him to keep the required number of buckets, in good and serviceable condition, at the place designated, ready for instant use. And, in this connection, the court held that the jury should have been instructed that "It is incumbent on the assured to show" substantial compliance with the terms of the agreement or warranty.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

(3521 a)

193 - 28027

MAE BROWN,

Appellee,

v.

GERMANIA SAFE DEPOSIT COMPANY, a corp.,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

232 I.A. 623

Opinion filed Dec. 28, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant company seeks to reverse a judgment for $4,000.00 recovered against it by the plaintiff in the Superior Court of Cook County.

The plaintiff filed her original suit against the defendant on March 21, 1921, on which date she filed a declaration alleging that the defendant maintained safety deposit vaults for the safe-keeping of the property of others; that it rented the plaintiff a safety deposit box in its vaults, for $3.00 per year, wherein it deposited the money and property of the plaintiff for safe-keeping; that in consideration of this rental, the "defendant undertook and promised the plaintiff to safely keep for her all such moneys, and property as plaintiff might, from time to time, thereafter * * * deposit in said box for safe-keeping; that defendant would permit no other person to have access to said box and that said moneys and property should not be delivered to, removed or taken away from said box, by any person save the plaintiff"; that the plaintiff deposited $4,650.00 in this box, in

Appellee,	
v.	
Appellant.	

Opinion filed Dec. 18, 1924.

Mr. Justice Greenwood delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1,000.00 recovered against it by the plaintiff in the Supreme Court of Cook County.

The plaintiff filed his replevin suit against the defendant on April 21, 1921, on which date he filed a declaration alleging that the defendant unlawfully and wrongfully took the property of the plaintiff for the value of $1,000 and detained the same from him, for the reason that the defendant is a corporation engaged in the business of selling and delivering motor vehicles, and that the plaintiff's property was in its possession for the purpose of being sold and delivered to the plaintiff, and that the defendant wrongfully and unlawfully took the property from the plaintiff and detained the same from him, to the damage of the plaintiff in the sum of $1,000.00 in this suit. In

currency; that the defendant did not safely keep this currency but permitted it to be taken from the box without the plaintiff's knowledge or consent, whereby the money was lost to the plaintiff and has never been recovered by her. This first suit was dismissed for want of prosecution and within a year thereafter, the plaintiff started another suit against the defendant. In this second suit she first filed a declaration which was a copy of the one she had filed in the first suit. Later, on November 3, 1921, she filed an amended declaration in which the preliminary allegations were the same as those contained in the declaration originally filed, after which, she alleged that on June 10, 1914, for a consideration of $1.50, the defendant leased to her a safety deposit box in which to keep moneys, securities or other valuables, and that the amount she paid in rental at that time paid for the box up to December 10, 1914; that "it then and there became the duty of the defendant, and it, through its agents and servants, undertook and promised to exercise ordinary care and diligence to safely keep for the plaintiff said moneys, securities, etc., as she should, from time to time, deposit therein for safe keeping, and they would permit no other person to have access to said safety deposit box except the plaintiff." The remainder of the declaration contained allegations similar to those contained in the latter part of the declaration originally filed by her. To this declaration the defendant filed a plea of non assumpsit and also one setting up the statute of limitations. The plaintiff filed a replication, alleging that the cause of action set forth in her amended declaration was the same as that which was set forth in her original declaration. The defendant filed a rejoinder and on the issues thus formed, the evidence was submitted to a jury, resulting in a verdict

for the --

necessary; that the Internment did not merely keep this dangerous but particular is to be seen from the use without the plaintiff's knowledge or consent, whereby the money was lost to the plaintiff -as has never been recovered by him. This first suit was dismissed; for years of prosecution and nearly a year thereafter, the plaintiff started another suit against the defendant. In this amended suit the first time is substituted with a copy of the one she had filed in the first suit. Later, on November 8, 1921, the third in amended declaration in which the preliminary allegations are the same as those contained in the mentioned original; third, after which, was alleged that on June 13, 1919, for a consideration of $1,00, the defendant issued to her a stock certificate in which it was agreed, conditions or stipulations, and that the annual dividend in regard to such stock for the year 1919 would be paid in regard to such stock for the year on or before December 10, 1919; that "it was not in her power the duty of the defendant, and it, through its simple and negligent, indifferent and omitted to exercise ordinary care and diligence to notify Mary for the plaintiff with money, securities, etc., as was should, this case to time, because certain for well knowing, but they would place an other person or have access to said money deposit box where the plaintiff." The remainder of the declaration contained allegations similar to those contained in the latter part of the declaration a original filed by her. In this declaration the defendant filed a plea of non-assumpsit and also was acting as the agents of individuals the plaintiff filed a replication, alleging that the cause of action her death in her amended declaration was the same as that which was set forth in her original declaration. The defendant filed a rejoinder and on its issues thus formed, the evidence was submitted to a jury, resulting in a verdict

for the plaintiff and the judgment in her favor, above referred to.

In our opinion, the cause of action set forth by the plaintiff in her original declaration and in her amended declaration is one and the same. The essential elements of that cause of action are that the defendant maintained a safety deposit vault; that it rented a box in that vault to the plaintiff for a consideration paid by her; that the plaintiff deposited certain money belonging to her in the box; that the defendant thereby undertook to keep the money safely and return it to the plaintiff on demand, but that it failed in that undertaking, and, on the contrary, permitted someone other than the plaintiff to remove the money from the box and take it away. The fact that the period for which the plaintiff rented the box and the amount she paid in the way of rental, are stated differently in the two declarations, is immaterial, as these matters are merely incidental to the contract of bailment, which is alleged as the basis of the plaintiff's cause of action in both the plaintiff's declarations. Furthermore, the amended declaration is not subject to the plea of the statute of limitations, because it alleges in substance that the extent of the defendant's obligation under the contract to perform, was to exercise ordinary care in keeping the plaintiff's money safely and to permit no person to have access to the box or remove the money, except the plaintiff, whereas in the original declaration she alleged that the defendant, by its contract to perform, undertook to keep her money safely and permit no other than the plaintiff to have access to the box or remove the

for the plaintiff was his business in her town, where referred to.

In our opinion, the cause of action our case by the plaintiff in her original declaration was in her amended declaration in one and the same. The controlling elements of that cause of action are that the defendant maintained a safety deposit vault; that it rented a box in that vault to the plaintiff for a consideration paid by her; that the plaintiff deposited certain money belonging to her in the box; that the defendant thereby undertook to keep the money safely and return it to the plaintiff on demand, but that it failed in that undertaking, and, on the contrary, permitted someone else to take the plaintiff to remove the money from the box and take it away. The fact that the period for which the plaintiff rented the box and the amount she paid in the nature of rental, are stated differently in the two declarations, is immaterial, as these matters are merely incidental to the contract of bailment, which is alleged as the basis of the plaintiff's cause of action in both the plaintiff's declarations. Furthermore, the amended declaration is not subject to the plea of the statute of limitations, because it alleges in substance that the cause of the defendant's negligence under the contract in question, was in consequence of the keeping the plaintiff's money safely and in permit it to be stolen by someone to the end of recover the money, except the plaintiff, thereby in the original declaration also alleged that the defendant, by its servant in some form, undertook to keep her money safely and return to when then the plaintiff to have access to the box to remove the

money. The allegation in which she sets forth her contention as to the degree of care imposed by the law on the defendant, under the circumstances set forth in her declaration, is not an essential part of the statement of her cause of action, and should therefore be treated as surplusage. Counsel for the defendant in the brief filed in this court, contend that in both the original and amended declaration the plaintiff has set forth these undertakings of the defendant as express contracts entered into by it, the one declared on in the original declaration being to the effect that the defendant will keep the property safely and return it to the plaintiff and permit no other person to have access to it, whereas the contract declared on in the amended declaration is to the effect that it will only use ordinary care and diligence to that end. In our opinion, neither declaration declares on an express contract but both are based on an alleged implied contract. The only essential allegation as to the implied promises of the defendant is the same in both declarations, namely, that it would keep the money safely and return it to the plaintiff and permit no other person to get possession of it. On the state of facts set forth in the declaration, the law would impose on the defendant, the obligation to use ordinary care and diligence in caring for the plaintiff's property. Mayer v. Brensinger, 180 Ill. 110; Schaefer v. Safety Deposit Co., 281 Ill. 43.

The defendant's contention that the cause of action set forth by the plaintiff in her amended declaration is different from the one set forth in her original declaration, is not supported by the case of Phelps v. Ill. Cent. R. R. Co., 94 Ill. 548, as the defendant maintains. The two declarations

wang. The allegation in which she sets forth her relation as to the degree of care imposed by the law on the defendant, under the circumstances set forth in her declaration, is not an essential part of the statement of her cause of action, and should therefore be treated as surplusage. Counsel for the defendant in the brief filed in this court, concedes that in both the original and amended declaration the plaintiff has set forth these understandings of the defendant as express warranties subsisting into by it, the one contained in the original declaration being to the effect that the defendant will keep the property safely and return it to the plaintiff and permit no other person to have access to it, whereas the contract declared on in the amended declaration is to the effect that it will only use ordinary care and diligence to that end. In our opinion, neither declaration declares on a express warranty but both are based on an alleged implied condition. The only substantial allegation as to the limited character of the obligation in the case in both declarations, namely, that it would keep the money safely and return it to the plaintiff and permit no other person to get possession of it. On the score of more care and diligence in the declaration, the law would imposed on the defendant, the obligation to use ordinary care and diligence in seeking for the plaintiff's property. Baker v. Bremner, 104 Ill. 1[illegible]; Tubbs v. Adams Express Co., 103 Ill. 4[illegible].

The defendant's contention that the mode of acting set forth by the plaintiff in her amended declaration is differ ent from the one set forth in her original declaration, is not supported by the case of Ibbins v. Ill. Cent. R. R. Co., 84 Ill. 264, as the defendant maintains. The two declarations

involved in the case cited were based on two separate and distinct liabilities, one a liability for refusal to receive grain when tendered for transportation and the other a liability for failing to carry the grain after accepting it. In the case at bar, the two declarations declared on the same liability, namely, the failure of the defendant to safely care for the plaintiff's money and return it to her.

The defendant contends that there is no basis in the record for a verdict of $4,000.00, but that if the plaintiff was entitled to recover at all she was entitled to recover $4,650.00. The evidence of the plaintiff was to the effect that she had put an aggregate of $4,700.00 in this box, and on one occasion she drew out $50.00. The $4,700.00 was made up of several items, the main one of which was an item of $4,000.00. The plaintiff testified that she had a mortgage for that amount and she sold it and took the cash realized therefrom and put it in this box. The other items consisted of; $200.00 transferred to this box from one she had previously rented from the defendant, jointly with another woman, and $500.00 received from her brother-in-law as payment of a loan she had made to him. There was some corroboration of the plaintiff as to each of these items. The corroboration as to the first item was documentary, and it may well be that the jury concluded that the plaintiff had the amount of the first item, and had put it into this box, as she said she had, but that they did not consider the proof as to the other items sufficient to warrant them in finding the issues for her as to them.

involved in the case cited were based on the concrete and distinct liability, and a liability for refusal to provide with case documents for transportation and the other a liability for failing to carry the grain after accepting it. In the case at bar, the defendants defended on the same liability, namely, the failure of the defendant to notify owner for the plaintiff's money and return it to him.

The defendant contends that there is no merit in the remedy for a refund of $4,000.00, but that if the plaintiff was entitled to recover at all she was entitled to recover $4,000.00. The evidence of the plaintiff was to the effect that she had put up an aggregate of $4,700.00 in this box, but on one occasion she drew out $300.00. The $4,700.00 was made up of several items, the main one of which was an item of $4,000.00. The plaintiff testified that she had a mortgage for that amount and the most it was not such she made required therefrom but not if in this box. The other items amounted to; $700.00 transferred to this box from one she had previously rented from the defendant, $1000.00 in another account, and $500.00 received from her husband-in-law as payment of a loan she had made to him. There was some misunderstanding of the plaintiff as to exactly which items. The conversation as to the first item was necessary, and it may well be that the jury concluded that the plaintiff had the consent of the first item, and had put it into this box, in who and the 2nd, but that they did not consider the proof as to the other items sufficient to warrant them in finding the issues for her as to them.

It is the defendant's further contention that the evidence showed that the box in question was not rented to the plaintiff but to her and a man known as Martin Brown, who was with her at the time the box was rented and was introduced, on that occasion, to the manager of the defendant's safety deposit vault, as the plaintiff's husband. The evidence on that point was in sharp conflict. The plaintiff admitted that at the time she rented the box Brown was with her and that she introduced him as her husband and that she was then living with him as his wife, although they had never been married, and she had a husband living and he had a wife living. Plaintiff and her husband were subsequently divorced, and the plaintiff testified that she did not know that Brown was married and that she was living with him, on his promise that he would marry her.

Her testimony was that the manager asked her if the box was to be in her name or in hers and Brown's, and she told him it was to be in her name and that she was the only one that was to have access to it. That such was the case, is borne out to some extent by the fact that the box was put down on the defendant's records, in the name of Mae Klinger. At a later date, when the plaintiff was divorced from her husband, her name on the defendant's records was changed to Brown. The evidence shows that after this money was put in the box, the plaintiff and Brown made several calls at the defendant's vaults together, and then one day Brown appeared alone and explained that his "wife" was sick and she needed some money and had sent him over to get it. It would seem to be clear from the evidence in the re-

It is the Gatekeeper's further assumption that the criminal secret has too many in question was not proof to the plaintiff but to be not a man frown at getting Jerome, who was only her as the time his boy was crushed and the interfered, on that occasion, to the manager of the Gatekeeper's safety signal would, on the plaintiff's business. The evidence on that point was in sharp conflict. The plaintiff admitted that at the time she treated the boy Jerome was with her and that she intermeddle his to her relation and that she was living with him at its city, although they had never been married, and she had a husband living and by him a wife living. Plaintiff and her husband were subsequently divorced, and the plaintiff testified that she did not know that Jerome was married and that she was living with him, on its trouble that he was a married man.

Her testimony was that her mother asked her if the boy was to be in her home or in hers and Jerome's, and she told his she is not to be in her home but with the boy for only one that was to have trouble in it. That such was the case, it seems not to have arisen by the fact that his wife was put down on the Gatekeeper's records. In the mean of the filing. At a later date, when the plaintiff was discovered from her husband, the case of the Gatekeeper's records was changed to suicide. The evidence showed that after this event was put in its box, the plaintiff and Jerome lived together. While at the Gatekeeper's residence lastly, and that the day from separated alone and retained that the "wife" was sick and she needed some money and Jerome said that over "I put it. It would seem to be clear from the evidence in the we

cord, that it was only after some persuading on his part that the defendant's manager permitted him to open the box, and he subsequently admitted that he should not have done it. The manager's testimony was to the contrary. He testified that when the box was rented the plaintiff said it was to be in her name but "I want my husband here to have access also;" that he then said that both of them would have to sign the card and the plaintiff said he could not write, to which the manager replied, "all right." The manager testified further, "so we used his name as a password 'Martin'."

On the trial the plaintiff introduced the declaration filed by her in her original case and also pleas filed by the defendant, and a replication filed by the plaintiff. These were no part of the plaintiff's proof, and defendant's objection to them should have been sustained. Presumably the plaintiff was endeavoring to prove that the right of action she had set up in her original suit was the same as the one she was endeavoring to maintain in the suit at bar. This was a question of law for the court and not a question of fact for the jury, and it should have been so treated both in the pleadings and in the proof, but we do not consider this as any ground for reversing the judgment. We hold that the causes of action in the two declarations were the same and that the evidence in the record is sufficient to support the verdict.

The judgment of the Superior Court will, therefore, be affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

court, that it was only after some persuading on his part that the defendant's manager permitted him to open the box, and he subsequently admitted that he should not have done it. The manager's testimony was to the contrary. He testified that when the box was opened the plaintiff said it was to be in her name but "I want my husband here to have access also;" that he then said that both of them would have to sign the card and the plaintiff said he would not write, to which the manager replied, "All right." The manager testified further, "we used all over as a password 'Austin'."

In the trial the plaintiff introduced the contract filed by her in her original suit and also plead filed by the defendant, and a certified copy of the plaintiff. There was no part of the plaintiff's proof, and defendant's objection to them should have been sustained. Presumably the plaintiff was endeavoring to prove that the right of action she had set up in her original suit had been in the one she was endeavoring to maintain in the suit at bar. This was a question of law for the court and not a question of fact for the jury, and it should have been so stated in the pleadings and in the proof, and we do not consider this as any ground for overturning the judgment. It took first the course of action in the two declarations were the same and that the evidence in the record is sufficient to support the verdict.

The judgment of the superior court will, therefore, be affirmed.

Judgment affirmed.

TATUM, C.J., AND DIXON, J., CONCUR.

208 - 38043

(35220)

J. M. HOYT,
Appellant,

v.

RYAN COMPANY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

232 I.A. 624

Opinion filed Dec. 26, 1928.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Hoyt brought this action against the defendant Ryan Company, on a promissory note for $4160.00, signed by the defendant and drawn to the defendant's order and duly endorsed by it. The issues involved were tried by the court without a jury, after which the court found the issues against the plaintiff and entered judgment accordingly, to reverse which the plaintiff has perfected this appeal.

The note in question was executed and delivered by the Ryan Company, in payment of 26 tractors. The Ryan Company refused to pay the note, alleging a total failure of consideration in that the seller had agreed to furnish Perfection Water Circulators, as a part of the equipment on these tractors, but had failed to carry out the agreement, for which reason the defendant elected to rescind the contract. It appears from the record that the tractors in question had been manufactured by a concern which had gone into the hands of a receiver. The Commerce Trust Company was a creditor of the manufacturing company, and the latter being in need of some funds to meet

[illegible] - [illegible]

J. S. [illegible],

Appellant,

v.

[illegible] COUNTY,

Appellee.

APPEAL FROM

[illegible] COURT

OF [illegible].

Opinion filed Dec. 28, 1928.

Mr. JUSTICE [illegible] delivered the opinion of the court.

The plaintiff brought this action against the [illegible] Oil Company, on a promissory note for $[illegible], signed by the defendant [illegible] Company by the President [illegible] and duly attested by it. The issues [illegible] were tried by the court without a jury, after which the court found the issues against the defendant and rendered judgment accordingly, to review which the plaintiff has appealed to this court.

The note in question was executed and delivered by the oil company, in payment of 50 [illegible]. The oil company refused to pay the note, alleging a total failure of consideration in that the [illegible] had agreed to furnish satisfactory [illegible], in a [illegible] of the equipment to drill [illegible], but had failed to carry out the agreement. For which reason the defendant elected to rescind the contract. It appears from the record that the [illegible] in question had been manufactured by a company which had gone into the hands of a receiver. The defendant first company was a corporation of the [illegible] company, and the latter being in need of money [illegible] to meet

a payroll, the Commerce Trust Company had advanced those funds and taken warehouse receipts on the tractors in question, as security. Subsequently, the latter came to be the property of the Commerce Trust Company. The tractors, called for by these receipts, were in a warehouse in the City of Omaha. The Ryan Company was located in the latter city. One Hoyt, (not the plaintiff) representing the Commerce Trust Company, called on the defendant company in Omaha, and entered into negotiations which resulted in the sale of these 26 tractors to the defendant company. There were a good many features involved in the negotiations, to which it will not be necessary to refer in this opinion, having to do largely with the possibility of the defendant company, coming to be the distributing agent for these tractors, in the Omaha territory. In the sale of these 26 tractors to the defendant, the Commerce Trust Company occupied the position of the seller and it appears that the plaintiff, Hoyt, occupies the same status as does the Commerce Trust Company.

In contending that there was not an entire failure of consideration for this note, as pleaded by the defendant, the plaintiff takesthe position that although there was an agreement on the part of the seller of these tractors, to deliver Perfection Water Circulators to replace the cooling system installed in the tractors at the time the sale was consummated, such delivery was not necessary to the completion of the sale, and, inasmuch as the defendant received the warehouse receipts for the tractors, it was not in a position to rescind the contract, for a total failure of consideration, even if it had not received the Perfection Water Circulators. With that contention we are unable to agree. The promise to deliver

a period, the Commerce Trust Company has advanced those funds and taken warehouse receipts on the tractors in question, as security. Subsequently, the latter came to the property of the Commerce Trust Company. The tractors, called for by these receipts, were in a warehouse in the City of Omaha. The Open Company was located in the latter city. One day, (but the plaintiff) representing the Commerce Trust Company, called on the defendant's company in Omaha, and entered into negotiations which resulted in the sale of these 20 tractors to the latterout company. There was a good many features involved in the negotiations, to which it will not be necessary to refer in this opinion, having to do largely with the liability of the defendant company, owing to the distributing agent for these tractors, in the Omaha territory. In the sale of these 20 tractors to the defendant, the Commerce Trust Company consulted the interests of the seller and it appears that the plaintiff, acting, meanwhile the same status as does the Commerce Trust Company.

In contending that there was not in spite fair- ness of consideration for this sale, as claimed by the attorneys, the plaintiff somewhat contends that although there was an agreement on the part of the seller of these tractors, to deliver Particular Vest Distributors to replace the ending system installed in the tractors at the time the sale was con- summated, such delivery was not necessary to the consideration of the sale, and, inasmuch as the defendant received the warehouse receipts for the tractors, it was not in a position to question the contract, for a total failure of consideration, even if it had received the replacement Vest Distributors. With this contention we are unable to agree. The promise to deliver

Perfection Water Circulators was an inseparable part of the contract. It was an inseparable part of the consideration for the note given by the defendant. There was a failure of that part of the consideration. A failure of an inseparable part of the entire consideration constitutes an entire failure of the consideration. Benjamin on Sales, (1920 Ed.) p. 485. It is clear from the evidence that what the defendant purchased was 26 tractors equipped with Perfection Water Circulators, and inasmuch as it did not receive that equipment, it had the right to rescind the sale. One Ryan, vice-president of the defendant company, testified that when he conferred with representatives of the Commerce Trust Company, in Chicago, in August, 1918, they told him that the tractors in storage in Omaha were equipped with a water cooling device, which was defective and could not be used and they agreed to furnish Perfection Water Circulators, to replace the device with which the tractors were then equipped. Shortly thereafter, one of these tractors was removed from the warehouse in Omaha, by representatives of the seller, and a demonstrtation of its mechanical operation was made, and Ryan testified he told these representatives it was satisfactory and he was willing to close the deal "on the basis as previously outlined." He further testified that the water cooling system had been discussed with both the representatives of the seller in Chicago and with those who demonstrated the tractor in Omaha and it had been agreed that all the tractors would be furnished with Perfection Water Circulators. After the demonstration referred to, the warehouse receipts were delivered to the defendant, and the defendant executed and delivered the note sued upon.

Partisans never distinguish one an inexplicable part of the contract. It was an inexplicable part of the condemnation for the note given by the defendant. There was a failure of that part of the consideration. A failure of an inexplicable part of the entire consideration constituting an entire failure of the consideration. Brightly vs Dalton, (1800 Ga.) p. 425. It is clear from the evidence that such the defendant purchased one of Stanley's building with Pacific Water Transportation, and thereby as it did not receive that equipment, it had the right to rescind the sale. Mr. Ryan, vice-president of the defendant company, testified that when he contracted with representatives of the Pacific Trust Company, in Chicago, in August, 1911, they told him that the vessels in question were equipped with a water cooling device, which was difficult and costly to be used but they agreed to install refrigerating plant instead, to replace the device with which the Stanley was then equipped. Shortly thereafter one of these vessels was removed from the waterways of Canada, by representatives of the seller, for a demonstration of the refrigerating system was made, but upon examination it was found unsatisfactory and he was willing to place the boat "on the basis in great lady entitled." In further testified that the water cooling system had been eliminated with both the representatives of the seller in Chicago and with those who demonstrated the device in Canada and it was agreed that all the vessels would be furnished with refrigerating plant instead. After the demonstration referred to, the warehouse receipts were delivered to the defendant, and the defendant accepted and delivered the bills and good.

That the furnishing of the Perfection Water Circulators was an essential and inseparable element of the sale, appears from a number of references made throughout an extended correspondence between the parties, and the same fact is also established by the testimony of witnesses for the plaintiff. Howard H. Hoyt, testified that at the time the demonstration was made in Omaha, "We agreed to furnish Mr. Ryan, at no charge, with the Perfection Water Circulators." Mr. Carey, another witness for the plaintiff, testified that in his first talk with Ryan on this sale, he told Ryan about the defect in the water cooling device, with which the tractors were equipped; that "the circulator on them was possibly of a low pattern and that it was inclined to heat up too rapidly and that another circulator should be installed " * " and I agreed to send out to him, Perfection Water Circulators with the 36 that he was to buy."

The question of whether Perfection Water Circulators were supplied to the defendant on any of these tractors, prior to the rescision of the contract by the defendant, in December 1918, as well as the question of whether the defendant had formally rescinded the contract at that time, was the subject of sharply conflicting testimony. It appears from the evidence that some circulators were shipped to the defendant at Omaha, by the Commerce Trust Company in September or October, but they were not the Perfection Water Circulators, and this error was subsequently admitted, and the representative of the Commerce Trust Company assured the defendant that the Perfection Water Circulators would be forwarded shortly. Mr. Ryan, of the defendant company, came to Chicago on November 8, 1918, for a conference with the representatives of the Commerce

That the feasibility of the Jefferson Water Corporation was an essential and innovative element of the sale, appears from a number of references made throughout an extended correspondence between the parties, and the same fact is also established by the testimony of witnesses for the plaintiff. Howard E. Doyle, testifying that at the time the transaction was made in doubt, the survey to furnish Mr. Ryan, in no charge, with the preliminary water distribution. Mr. Doyle, another witness for the plaintiff, testified that in his first talk with Ryan on this sale, he told Ryan about the letter in the water control letter, with which the inventory was enclosed, that "it alleviates to some possibility of a law suit and that it was inclined to back up the reality and that another circumstance should be the stated ", " and I agreed to send out to him, representing Water Distribution with the 20 that he had to buy."

The question of whether Jefferson Water Corporation was included in the inventory on any of these transfers, rests on the resolution of its ownership by the corporation, in consequence thereof, as well as the question of whether the defendant had formally ratified the security of this sale, but the opinion of Judge Doyle contradicting statement. It appears from the opinions that some circumstances were adduced to the defendants to show, by the Commonwealth's trial counsel to determine as follows, but this was not the testimony tends inconclusive, and this error not correspondingly modified the responsibility of the Commonwealth's trial counsel adduced all contained that the Jefferson Water Distribution was to be improved property. Mr. Ryan, at the Bartlett Research, made the things on December 9, 1969, has a conference with the representatives of the Commonwealth

Trust Company and several of the latter testified that at that conference Ryan was asked whether the Perfection Water Circulators had finally arrived and that he stated, in substance, that they had, and further, that the delay had not caused him any inconvenience anyhow, as he had found that it was too late in the season to sell these tractors and that there would not be much opportunity of selling them before spring. Ryan denied making any such statements at that conference. Mr. Frederic F. Vose, representing the defendant, testified that on December 31, 1918, he talked with Mr. Garey, representing the plaintiff, concerning the note here in suit and that at that time Garey contended that the circulators had gone forward to the defendant but that he, in the presence of the witness, called up Howard Hoyt, Jr. to make sure of it, and that after a telephone conversation, Gary told the witness that Hoyt had stated that the circulators had not been delivered but that they had all been crated and would be turned over to the transportation company that day. There was introduced in evidence, as one of the defendant's exhibits, an invoice from the successor of the manufacturer of these tractors, from which the Perfection Water Circulators were purchased, indicating a sale, without a charge, to the defendant company, of "10 Perfection Water Circulators," and the date of the shipment of these circulators is given on the invoice as "12-31-18", the date on which, Vose testified he had his talk with Garey, as outlined above. When Mr. Howard Hoyt was testifying he stated that as soon as he returned to Chicago from Omaha, after the trip on which the demonstation of the tractor had been made for the defendant, he directed the proper party to have the defendant shipped, immediately, "ten" of the Perfection Water Cir-

that Dempsey and several of the letter testified that at that conference Ryan was asked whether the Perforation Water Distribution had finally arrived and that he stated, in substance, that they had, and further, that the delay had not caused him any inconvenience whatsoever, as he had found that it was too late in the season to sell these tractors and that there would not be much opportunity of selling them before spring. Ryan denied making any such statements at that conference. Mr. Frederic T. Vose, representing the defendant, testified that on December 21, 1917, he talked with Mr. Gray, representing the plaintiff, concerning the note involved in suit and that at that time Gray contended that the circumstance had gone forward to the defendant but that he, in the presence of the witness, called up Daniel Ryan, Jr. to make sure of it, and that after a telephone conversation, Gray told the witness that Ryan had stated that the circulars had not been delivered but that they had all been crated and would be turned over to the transportation company that day. There was introduced in evidence, as one of the defendant's exhibits, an invoice from the manufacturer of the manufacturer of these tractors, from which the Perforation Water Distributors were purchased, indicating a sale, without a charge, to the defendant company, of "10 Perforation Water Distributors," and the date of the delivery of these circulars is given on the invoice as "12-21-17", the date on which, Vose testified he had his talk with Gray, as outlined above. Then Mr. Howard Ryan was testifying he stated that as soon as he returned to Boston from Iowa, after the trip on which the demonstration of the tractor had been made for the defendant, he directed the vendor party to have the defendant shipped, immediately, "one" of the Perforation Water Dis-

culators. Immediately after that statement, the witness was asked, "How many?" and he then answered, "twenty-six", and added, "I had in mind something else." It would seem from the invoice above referred to, dated December 31, 1918, giving the date of shipment of the goods invoiced, as December 31, 1918, the date on which Voss testified Garey told him that Hoyt had stated over the telephone that the circulators were crated and would go forward that day, and from the further fact that the invoice calls for 10 Perfection Water Circulators, that the witness Hoyt had that shipment in mind when he was testifying and mentioned that he had made the request that the defendant be furnished with 10 of these circulators.

One Fradenburg, a lawyer from Omaha, testified that sometime during the holiday week of 1918, he came to Chicago, representing the defendant, and had a talk with Garey representing the Commerce Trust Company and advised him that the defendant would not pay the note in question, because of the fact that Garey's clients had failed to carry out their contract with the defendant, inasmuch as they had not furnished Perfection Water Circulators "which were to be a part of this equipment." He further testified that on the occasion of this trip to Chicago he made another visit to Garey's office and tendered 23 warehouse receipts, each of them calling for one of the tractors in question. This also was the subject of sharp conflict in the testimony, Garey testifying that no such tender was made. The trial court found in effect that the tender was made and this court is not in a position to say from the evidence in the record that the finding was against the manifest weight of the evidence. As to the balance of these tractors - four in number -

culture. Incidentally after that statement, the witness was asked, "How many" and he then answered, "twenty-six", and added, "I had in mind something else." It would seem that the learned Queen Justices in, United Germany (1), July, giving the date of adjourned of two weeks involved, on December 31, 1918, the date on which Vom Zeitlich Gesay said the Kaiser had visited over the telephone that six divisions were ready and would go forward that day, and also the Guards that the issue with for in preparation been discussion, was the always very had that although in brief then on the Kaiser-ing and mentioned that is not was the because that the difficul-not be translated with in of Vienna revolutions.

Her Fraenkeung, a lawyer from Cologne, testified that something during one bitterly was of life, he work to Cologne, representing the Reichstag, and had I said also Berry interrupting the answers from Judge not asked him that the defendant would not say the work in question, because of the fact that Berry's witness had failed to carry out their contract with the defendant, inasmuch as they had not furnished performing their witnesses which they to be a part of this equipment." Dr Turkey testified that on the occasion of this trip in Cologne he and another visit to Berry's office and inquired in murderous receipts, each of them calling the one of the Kaiserin in question. That also was the subject of some conflict in the testimony, Berry testifying that he took undertaken part. The trial court found in effect that the Kaiser was sole and this court is not in a position to say from the evidence in the record that the finding was against the manifest weight of the evidence. As to the balance of these complaints - that in another -

one was covered by a warehouse receipt, which, from the testimony, appears to have been lost. The warehouse receipts on the other three had been surrendered on the occasion of the trip of the representatives of the Commerce Trust Company to Omaha, for the purpose of making the demonstration of these tractors for the defendant, and the evidence submitted in behalf of the defendant was to the effect that these three tractors were removed from the warehouse by the representatives of the plaintiff. It appears that one of these three was later sold by an agent who seems to have been representing both the plaintiff and the defendant and a note for $304.00, received by the defendant on account of that sale, was sent on to the Commerce Trust Company, but the testimony is that the sale did not finally go through because of the failure to furnish the Perfection Water Circulator for installation as a part of the equipment of that tractor. As to the remaining two tractors, the testimony of Ryan was to the effect that they were not in the defendant's possession. It would seem further from his testimony that these two tractors had been used for demonstrating purposes and that they were out in the vicinity of Omaha, where they had been so used. In our opinion, the circumstances disclosed by the evidence, are such as to make it unnecessary for the defendant to have made a tender of these tractors, in order to be in a position to successfully defend the suit brought by the plaintiff on its note. According to the testimony submitted on behalf of the defendant, it appears that when the defendant's representative came to Chicago during Christmas week, in 1918, and notified the plaintiff that the defendant had elected to rescind the contract, and made a tender of

are not covered by a warehouse receipt, which, then the
railroad, expects to have that. The statutes pro-
vide so his right since had been surrendered by the
cancelation of the slip of the representative of the Commerce
Trust Company to Drake, for the purpose of making the ad-
ministration of state treasurer for the defendant, and the
evidence adduced in behalf of the defendant was to the
effect that these three shipments were removed from the
warehouse by the representatives of the plaintiff. It
appears that one of these three was later sold by an agent
who stated to have been representing both the plaintiff and
the defendant and - more for them, or, receives by the ter-
minal on account of that sale, not left on to the Commerce
Trust company, but the testimony is that the will did not
finally go through because of the failure to receive the
Protection Fast Dispatcher Investigation on a part of the
equipment of that transfer. As to the remaining two shipments,
the testimony of Ryan was to the effect that they were not in
the defendant's possession. It was I need further give his
testimony that there for storage but that need for demurrage-
ship purposes had also they were not in the custody of Drake,
where they had been as said. In our opinion, the circumstances
displayed by the evidence, are such as to make it unnecessary
for the defendant to have made a tender of their interest, in
order to be in a position to successfully defend the suit
brought by the plaintiff on the note. According to the testi-
mony submitted on behalf of the defendant, it appears that when
the plaintiff's representative came to Drake during Octob-
ere week, in 1921, and notified the plaintiff that the defend-
ant had elected to rescind the contract, and said a letter of

all the warehouse receipts in the defendant's possession, the representative of the plaintiff not only refused such tender, but stated that if the defendant refused to pay its note, the only course open to the plaintiff was to sue the defendant on the note. In that situation, any further tender of the two or three tractors, which were not covered by the warehouse receipts, would, very apparently, have been a wholly futile thing, and the law will not require the defendant to do something which, in the view of the position taken by the plaintiff, would have been useless. 13 C.J. Sec. 681, p. 623; Puffer v. Bradley, 22 Ore. 181; Lindley v. Denver, 259 Fed. 83. While the witness Garey denies that the defendant's representative made any tender to him, of the warehouse receipts, he does not deny that defendant's representative told him the note in question would not be paid because of the failure to deliver the Perfection Water Circulators, as agreed, nor does he deny telling the defendant's representative that if the defendant was not going to pay its note, there was nothing left for the plaintiff to do but bring suit on the note.

There is some testimony in the record to the effect that the Perfection Water Circulators were a patented article which could be procured in the open market and the plaintiff invokes the rule of damages, to the effect that on failure of the seller to deliver the goods, the buyer may purchase the goods elsewhere, and the measure of damages will be the difference between the contract price and the price paid to obtain the goods, and it is contended that if the seller in the case at bar failed to deliver the Prefection Water Circulators, it was incumbent upon the defendant to go into

all the recognized principles in the defendant's possession, the representatives of the plaintiff not only refused such tender, but stated that if the defendant returned to Jay the bank, the only course open to the plaintiff was to sue the defendant on the note. In that situation, Jay immediately at the two or three stations, which were not covered by the warehouse receipts, would, very correctly, have been a worthy little thing, and he did not refuse the defendant to do something which, in the view of the position taken by the plaintiff, would have been unwise. 14 O.L. Rev. 281, n. Ohio: Phillips v. Gaddis, 27 Ohio, 193; Lindley v. Sawyer, 29 Ind. 63. While the witness Jacoy denies that the defendant's representative made any tender to him, at the warehouse receipts, he does not deny that defendant's representative said his ship was in transitu and would not be paid because of the failure to deliver the protecting Bear Dividends, as agreed, nor does he deny having the defendants representative that if the firmness was not going to pay its note, Jacoy was seeking left the plaintiff to do by his bring suit on the note.

There is some testimony in the record to the effect that the defendant Baker discussions with a personal property which could be produced to the town except the plaintiff through the aid of sheriff, at the effort that he failed of his action to deliver the goods. The bonds are problems the goods elsewhere, and the matter of damages will be the difference between the contract price and the price paid to obtain the goods, but it is doubtful that if the seller is the hand-and at her failed to deliver the protection during transitions, it was impossible upon the defendant to be made

the open market and buy them. In our opinion this contention has no application to the issues presented here. As already stated, it was a part of the undertaking of the Commerce Trust Company, in making this sale, to equip the tractors sold with Perfection Water Circulators. If there was a failure to carry out that part of the agreement, on the part of the seller, the defendant buyer had the right to elect not to carry out the transaction. The Court found that there was such a failure on the part of the seller, in consequence of which, the defendant buyer did make such an election, and so informed the representatives of the seller.

The plaintiff contends that even on the assumption that the agreement to furnish Perfection Water Circulators was an inseparable part of the plaintiff's undertaking, and even on the assumption that this undertaking on the part of the plaintiff had not been fulfilled, at the time the defendant's representative came to Chicago during the Christmas week, in 1918, when the defendant claimed to have rescinded the contract, it should be held that the defendant was not then in a position to rescind, because the plaintiff had not undertaken to furnish the Perfection Water Circulators at any specified time, and therefore the law would imply an obligation to furnish them within a reasonable time. The plaintiff's position on this point might be well taken if the plaintiff had not had a reasonable time to furnish the Perfection Circulators and if no complaint had been made to the plaintiff by the defendant after the making of the contract and up to Christmas week of 1918, when the defendant rescinded. In that situation, the law might require the

the open market and buy them. In our opinion this contention has no application to the issues presented here. As already noted, it was a part of the underwriting of the Commonwealth Trust Company, in making this sale, to supply the trustees with interchange notes themselves. If there was a failure to carry out that part of the agreement, on the part of the seller, the defendants began but the right to elect not to carry out the transaction. The court found that there was such a failure on the part of the seller, in contemplation of which, the defendant buyer did make such an election, and so informed the representatives of the seller.

The plaintiff contends that even on the assumption that the agreement to furnish interchange notes originated was an independent part of the plaintiff's undertaking, was also on the assumption that this undertaking on the part of the plaintiff had not been fulfilled, at the time the defendant's representatives made to Shirley Adams the statement made, in 1919, when the defendant desired to have terminated the contract, it should be held that the defendant was not then in a position to rescind, because the plaintiff had not undertaken to furnish the interchange notes referred to at any specified time, and therefore the law would imply an obligation to furnish them within a reasonable time. The plaintiff's position on this point might be well taken if the plaintiff had not had a reasonable time to furnish the interchange notes and if no complaint had been made to the plaintiff by the defendant after the making of the contract and up to the time of the attempted rescission. In this situation, the law might require the

defendant, before rescinding, to notify the plaintiff that in view of the failure of the latter to furnish the circulators it would rescind the contract, unless they were forthcoming within a specified time.

Where, by reason of the inactivity of the parties, it might be considered that there had been a waiver of certain of the provisions of a contract entered into by them, it is doubtless the law that before either can return to a strict requirement of performance of the terms of the contract by the other, he would be obliged to give that other reasonable notice of such intention, in order to be in a position to rescind or place the other party in a position of default on the contract. Hibernian Banking Ass'n. v. Bell & Zoller Coal Co., 181 Ill. App. 581. And it may be that if the period of the inactivity of the parties is too long, and if there is a lapse of an unreasonable time, the parties may lose the right to declare a forfeiture, even after such notice. Williston on Contracts, sec. 832. But that is not the situation disclosed by the evidence in this record. On the other hand, it appears, the contract having been entered into early in August, that as early as August 22, the plaintiff notified the defendant that a Perfection Water Circulator had been forwarded to the defendant, by express, immediately after the return of the plaintiff's representative from Omaha, on the occasion of the demonstration trip, and that the balance could be arranged for upon notice from the defendant that they were desired. The evidence further shows that under date of September 23, the defendant wrote the plaintiff, announcing the sale of the one tractor which was sold, and the plaintiff was notified that they did not

defendant, before proceeding, to notify the plaintiff that in view of the failure of his lessee to furnish the stockholders it would revoke his license, unless they were forthcoming within a specified time.

Here, by reason of the inactivity of the parties, it might be considered that there had been a waiver of compliance of the provisions of a contract relied upon by them. It is doubtless the law that courts either can refuse to a strict requirements of performance of the terms of the agreement by the other, he would be obliged to give that other reasonable notice of such intention, in order to be in a position to rescind or place the other party in a position of default on his contract. Hoffman Brewing Co. v. Kohl & Dolley Dist. Co., 140 Ill. App. 607. Can it be said that if the period of the inactivity of the parties is too long and if there is a lapse of an unreasonable time, the parties may lose the right to declare a forfeiture, even after such notice. Williston on Contracts, sec. 831. But that is not the situation disclosed by the evidence in this record. On the other hand, it appears, the contract having been entered into early in August, that is early in August 1d, the plaintiff notified the defendant that a forfeiture under Clause 7 had been forwarded to the defendant, by express, immediately after the return of the plaintiff's representative from Cuba, on the occasion of the demonstration trip, and that the license could be arranged for upon notice from the defendant that they were desired. The evidence further shows that under date of September 27, the defendant wrote the plaintiff, summarizing the sale of the one tractor which was sold, and the plaintiff was notified that they did not

have a perfection Circulator for that tractor, "which is a part of said attachment." Up to this time the defendant had not received any Perfection Circulators. In this letter the defendant goes on to say, "These were to have come to us immediately. We shall be inclined to believe our future transaction will be unsatisfactory if we find it necessary to write for these single parts, after the sale is made. We would advise, if you cannot give your personal attention to all transactions, that you take the matter up with the proper party and insist that these parts have prompt attention." It would serve no purpose to detail further evidence, of which considerable is to be found in the record, indicating the repeated and persistent attempts to get these Circulators from the plaintiff, as agreed, and the representations of the defendant that unless they were supplied it would be quite impossible to successfully handle the tractors and sell them. It is apparent from the evidence in the record that the protracted failure of the plaintiff to furnish the Circulators as agreed was unsatisfactory to the defendant. Certainly the period from August to December or January, was more than a reasonable time for the performance of this part of the contract by the plaintiff. In situations which require a buyer, before the actual rescission of a contract, to notify a seller, who has agreed to supply a specified article, that unless this is done, the buyer will rescind, that requirement is for the purpose of both notifying the seller of the buyer's position, and giving the seller a reasonable time within which to perform. We think the circumstances disclosed by the evidence in this record are such as to show that the plaintiff

have a particular circulator for that purpose. "which is a part of said statement." In this view the defendant had not procured any fraudulent circulators. In this latter the defendant goes on to say, "Does very to have come to an insolvency. We shall be inclined to believe our future transaction will be unsatisfactory if we find it necessary to write for these single parts, after the sale is made. My world advise, if you cannot give your personal attention to all transactions, that you take the patent as will the proper party and insist that those parts have always attention." It would seem to warrant to insert further evidence, of which considerable is to be found in our record, indicating the technical and practical difficulties to not only circulate from the plaintiff, in person, and the representations of the defendant that unless they were unable to supply it would be quite impossible to successfully market the patent and sell them. It is apparent from the evidence in the record that the protracted failure of the plaintiff to furnish the circulators as agreed was unsatisfactory to the defendant. Certainly the letter from dated to December 22 January, was more than a sufficient excuse for the performance of this part of the contract by the plaintiff. In circumstances which require a buyer, before the actual production of a contract, to notify a seller, who has agreed to supply a specified article, that unless this is done, the buyer will resident, then requirement is for the purpose of both modifying the order of the buyer's position, and giving the seller a reasonable time within which to perform. In view the circumstances disclosed by the evidence in this record was such as to show that the plaintiff

was supplied with both of these elements. The plaintiff knew before the contract washalf a month old that the defendant was in immediate need of the Circulators and was asking that they be forwarded without any delay. According to the plaintiff's own contention they were an article which could be bought in the open market and no excuse is offered for the plaintiff's failure to supply them. The representatives of the Commerce Trust Company had told the plaintiff of the necessity of these Water Circulators, in order to make the tractors work properly. The defendant was trying to induce them to hurry them along, and, as already stated, they had more than a reasonable time to supply them. Moreover, it should be noted that when the plaintiff's representative was notified in December, that the defendant had elected to rescind the contract, no claim was made that the plaintiff was entitled to further opportunity to deliver the Circulators, before defendant would be in a position to rescind. Under the circumstances, we are of the opinion that the defendant was in a position to rescind without any formal notice that he would do so at some specified time, if there was further delay.

We find no error in the record and for the foregoing reasons, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

was sufficiently high of these elements. The plaintiff knew before the contract nearly a month old that the defendant was in immediate need of the commodities and was willing that they be furnished without any delay. According to the plaintiff's own contention they were an article which could be bought in the open market and no excuse is offered for the plaintiff's failure to supply them. The representatives of the Dominion Steel Company had told the plaintiff of the necessity of these tubes distributing, in order to make the tractors work properly. The defendants was trying to induce them to carry them along, and, as already stated, they had more than a reasonable time to supply them. However, it should be noted that the plaintiff's representative was notified in December, that the defendant had elected to rescind the contract, so claim was made that the plaintiff was entitled to further opportunity to deliver the commodities, before defendant could be in a position to rescind. Under the circumstances, we are of the opinion that the defendant was in a position to rescind without any formal notice that he would do so if some specified time, if there was further delay.

We find no error in the record and for the foregoing reasons, the judgment of the municipal court is affirmed.

JUDGMENT AFFIRMED.

TATUM, P.J., and O'CONNOR, J., concur.

243 - 28077.

(3523a)

F. P. SMITH, trading as the F. P. SMITH WIRE & IRON WORKS,
Appellee,

v.

WILLIAM H. GRAY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

232 I.A. 124

Opinion filed Dec. 26, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Gray seeks to reverse a judgment for the sum of $3911.01, recovered by the plaintiff in an action of the first class in the Municipal Court of Chicago.

The plaintiff's claim was based on a written contract calling for the erection of a fire-escape on the defendant's building, and also some inside metal work, in connection with the alteration of the building for use as a hotel, for which the contract provided the plaintiff was to receive $4600.00, and a supplemental contract providing for an increase of $765.00 in the amount which was to be paid the plaintiff for the work covered by the contract. The defendant had made a payment of $2,000.00. In the execution of the work there were a number of extras, ordered by the defendant and furnished by the plaintiff, which are not in question here. Including these extras, the amount which the plaintiff claimed was due him from the defendant was $3933.81, after crediting the payment of $2,000.00. The plaintiff also claimed interest which brought the total amount sued

No. 8723

F. F. Smith, sued in the
F. F. Smith also a last name,

Appellee,

vs.

Appellant.

Actual area
Activities court
of Antonio.

Opinion filed Dec. 26, 1923.

Mr. Justice Thomas delivered the opinion of the court.

By this appeal the defendant does seek to reverse a judgment for the sum of $8811.67, recovered by the plaintiff in an action of the trial court in the municipal court of Chicago.

The plaintiff's claim was based on a written contract calling for the erection of a five-story on the defendant's building, but also some inside metal work, in connection with the alteration of the building for use as a hotel, the plaintiff contend the defendant was to receive $4000.00, and a supplemental contract providing for an increase of $700.00 in the amount which was to be paid the plaintiff for the work covered by the contract. The defendant had paid some a payment of $4,000.00. In the execution of the work there were a number of extras, ordered by the superintendent and furnished by the plaintiff, which are not in question here. Including these extras, the amount which the plaintiff claimed was due him from the defendant was $8000.00, after crediting the payment of $4,000.00. The plaintiff also claimed interest which brought the total amount sued

for up to $4638.61. The defendant admitted that all of the work called for by the contract had been properly and satisfactorily done, but that the erection of the fire-escape, by the plaintiff, had not been accomplished within a reasonable time and that by reason of the delay in the execution of that part of the contract the defendant had been delayed in opening his hotel, to his great damage.

The defendant filed a claim in the nature of a set-off to recover the damage he alleged he had suffered by reason of this delay. The defendant also claimed that the part of the plaintiff's claim, represented by the $765.00, called for by the second contract, should not be allowed by reason of the fact that the defendant's promise to pay that amount was without consideration, inasmuch as, according to the defendant's claim, the work to be done by the plaintiff under that contract, was the same work covered by the original contract. The defendant also claimed that he was entitled to certain credits and allowances, for which the plaintiff had not provided in the statements he had submitted, nor in the statement of his claim as filed in the Municipal Court. In his statement of claim of set-off, the defendant also claimed an item of $800.00, which was the value of certain brass, which had been removed from the defendant's building in the course of the alterations and remodeling. The plaintiff's contract called for certain work in connection with the elevators and the elevator cages and doors. In connection with the changes in the elevators, this brass, which was in the protecting partition which surrounded the elevators originally, was claimed by the plaintiff under a clause in the specifications covering the eleva-

for so to state.". The defendant admitted that all of the work called for by the contract had been completed and satisfactorily done, but that the execution of the fire-escape, by the plaintiff, had not been completed within a reasonable time and that by reason of the delay in the completion of that part of the contract the defendant had been delayed in occupying its hotel, to its great damage.

The defendant filed a plea in the nature of a set-off to recover the damage by reason of delay in the execution of this delay. The defendant also claimed that the part of the plaintiff's claim, represented by the $[illegible], could not be allowed by the court, because, by the terms of the contract, the defendant's promise to pay that sum was without consideration. Instead of, according to the defendant's view, the work to be done by the plaintiff under that contract, the work to be done by the plaintiff under that contract, was the same work exacted by the original contract. The defendant also claimed that he was justified in withholding the sum allowed. The plaintiff had not provided in the statement of his contract, nor in the statement of his claim in filed in the municipal court. In the statement of claim of appeal, the defendant also claimed as item of $[illegible], which was the value of certain boxes, which had been received from the defendant's building in the course of the alterations and remodelling. The plaintiff's contract called for certain work in connection with the elevators and the exterior doors and doors. In connection with the doorway in the elevator, that area, which was in the [illegible] partition which was considered the elevator plaintiff, had existed by the plaintiff which made a change in the specifications covering the elevator

tor work, reading, "the old doors, tracks, etc. are to become the property of this contractor."

The trial court instructed the jury, as a matter of law, that under the evidence the defendant had waived any breach of the contract, by reason of delay in its performance up to September 27, 1916, and that it was for the jury to determine from the evidence what was a fair and reasonable time to perform the contract after that date, and whether or not the time of the performance by the plaintiff, as shown by the evidence, was reasonable. The original contract was dated May 2, 1916. It contained no stipulation as to the time within which the work in question was to be performed. In a letter of the same date, which was sent by the plaintiff to the defendant, with the contract, the plaintiff wrote, "in accordance with our understanding, we will start work on this at once." Such being the contract, it was incumbent upon the plaintiff to start the work called for by the contract and complete it within a reasonable time. In support of his appeal the defendant contends that the trial court erred in instructing the jury that there had been any waiver on his part with regard to the time of performance; first, because the plaintiff did not plead a waiver of any breach of the contract on his part, but pleaded performance of the contract according to all its terms; and second, because even if the plaintiff had so pleaded, the question of waiver was one of fact for the jury to consider and not a question of law. In our opinion, no question of waiver can properly be said to be involved in this case, but any error there may have been in instructing the jury on that subject was harmless, inasmuch

her work, reading, "the old house, barns, etc. are to become the property of this contractor."

The trial court instructed the jury, as a matter of law, that under the evidence the defendant had waived any breach of the contract, by reason of delay in his performance up to September 27, 1929, but that it was for the jury to determine from the evidence that was a fair and reasonable time to perform the contract after that date, and whether or not the time of the performance by the plaintiff, as shown by the evidence, was reasonable. The original contract was dated July 8, 1929. By contracting no stipulation as to the time within which the work is to be done was to be performed. As a lease of the farm land, which was kept by the plaintiff on the defendant, also the contract, the plaintiff could, "in conjunction with our understanding, go ahead work on this at once." Thus being the contract, it was incumbent upon the plaintiff to start the work called for by the contract and complete it within a reasonable time. In support of his request the defendant contends that the trial court erred in instructing the jury that there has been any waiver on his part with respect to the time of performance. First, because the plaintiff did not plead a waiver of any breach of the contract on his part, but pleaded performance of the contract according to its terms, and second, because even if the plaintiff had so pleaded, the question of waiver was one of fact for the jury to resolve and not a question of law. In our opinion, the contractual rights and property in suit to be involved in this case, but no error there may have been in instructing the jury on that subject was harmless, because

as we are further of the opinion that under the evidence the plaintiff is shown to have performed the contract. In other words, in our view of the case the plaintiff did construct the fire-escape in question within a reasonable and proper time, which was his requirement under the contract. Although the contract was entered into early in May, and the plaintiff undertook to start the work at once and complete it within a reasonable time, the work was not finished until late in November. A number of witnesses testified as to what a reasonable time for doing this work would be and the periods they named varied from ten days to ninety days. But, the evidence discloses why the plaintiff did not finish the construction of this fire-escape before November. The manager of the plaintiff's business testified that as soon as the contract in question had been entered into, the plaintiff's drafting force went to work on the contract and made up their shop drawings, which drawings were submitted to the defendant's architect and approved by him. The drawings were then taken to the Fire Prevention Bureau of the City of Chicago and they were approved by that bureau sometime in June. Under the ordinances of the City of Chicago it was necessary to have these drawings approved by the Department of Buildings of the City of Chicago, before a permit would issue and the work could proceed. It appears from the evidence that the inspector attached to the latter department, in the course of his duties was making inspections of the defendant's building in connection with the alterations that were being made on it, and when the plaintiff submitted the drawings covering the fire-escape, this inspector was called in and joined with the others in the consideration of the

as we see further on the question that under the evidence the plaintiff leaving to have performed the contract. In other words, in our view of the case the plaintiff did complete the fire-escape in question within a reasonable and proper time, which was in requirement under the contract. Although the contract was entered into early in May, and the plaintiff undertook to start the work at once and complete it within a reasonable time, the work was not finished until late in October. A number of witnesses testified in to state a reasonable time for doing this work would be and the periods they named varied from one day to ninety days. But, the evidence disclosed why the plaintiff did not finish the construction of this fire-escape before November. The answer of the plaintiff's witnesses testified that at no time as the contract in question had been entered into, the plaintiff's driving force was to work on the contract but was suddenly also drawing, which drawings were submitted to the defendant's architect and approved by him. The drawings were then taken to the fire protection bureau of the city of Chicago and they were approved by that bureau whereupon is done. Later the architect of the city of Chicago it was necessary to have these drawings approved by the department of buildings of the city of Chicago, before a permit could issue and the work could begin. It appears from the evidence that the inspector attached to the latter department, in the course of his duties was making inspections of the defendant's building in connection with the alterations that were being made to it, and when the plaintiff submitted the drawings covering the fire-escape, this inspector was called in to plead with the others in the consideration of the

drawings, and that at that time the inspector stated that the wall to which the fire-escape was to be attached, was not of sufficient strength to carry it and that there would have to be some steel put in before the drawings could be approved. The plaintiff's manager testified further that he then went back to the defendant and discussed the situation with him and later they both returned to the Building Department, and the representatives of the department repeated the situation to the defendant as they had outlined it to the witness. The defendant at that time said he was "going to look into it." Later on the plaintiff's manager had a number of conferences with the defendant and different plans were discussed for the strengthening of the wall, or the erection of such additional steel work as would permit the erection of the fire-escape. The witness referred to testified that these conferences extended over a period of six weeks or two months. On or about August 1, the defendant asked the plaintiff's manager for a copy of the drawings, saying he wanted to take the matter up with some architects and see what they thought about it, and, at the defendant's request, the plaintiff mailed a copy of the drawings to a firm of architects in the City of Chicago. Sometime later the plan to be used in meeting the objection of the Department of Buildings was agreed upon, and the plaintiff's manager testified that he and the defendant then drew up an agreement covering the extra steel work and the plaintiff then began to fabricate the steel. This agreement was then offered in evidence and received without objection. It is referred to in the record as plaintiff's Exhibit 5. We are unable to find any such exhibit within the abstract or the record. Pre-

drawing, and that at least since the inventor stated that the bell by which the fire-escape was to be attached, was out of sufficient strength to carry it and that there should have to be some steel put in before the drawing would be approved. The plaintiff's manager testified further that he then went back to the defendants and discussed the situation with him and later they both returned to the building department, and the representatives of the department repeated the situation to the defendant as they had written it to the attorney. The defendant at that time said he was "going to look into it." Later on the plaintiff's manager had a number of conferences with the defendants and different plans were discussed for the strengthening of the wall, or the erection of such additional steel work as would satisfy the requirements of the fire-escape. The witness referred to testified that these negotiations extended over a period of six weeks or two months. He or there about August 1, the defendant asked the plaintiff's manager for a copy of the drawings, saying he wanted to take the matter up with some architects and see what they thought about it, and, at the defendant's request, the plaintiff mailed a copy of the drawings to a firm of architects in the city of Chicago. Subsequent to the plan to be used in securing the adjustment of the deficiency of buildings was issued upon, and the plaintiff's manager testified that he had the defendant then have an agreement covering the extra steel work and the plaintiff was going to fabricate the steel. This agreement was then entered in evidence and received without objection. It is referred to in the report as plaintiff's exhibit 2. My use needs to find any such exhibit within the abstract or its record. Pre-

sumably, it is the supplemental agreement of September 27, to which reference has already been made. This was signed by the plaintiff's manager, representing the plaintiff, and by the defendant. It is written up on the defendant's letterhead. It calls for an additional $765.00, which, according to the agreement, the defendant promises to pay "in order not to delay the work further". The defendant refers to this agreement as a "holdup". The plaintiff's position is that it was for the additional steel, occasioned by the requirements of the City Department of Buildings. The permit for the work was duly issued by the department about a month later, and in less than a month after that the fire-escape was completed.

It is the contention of the defendant that under his contract the plaintiff was required to erect this fire-escape within a reasonable time; that such reasonable time was 90 days from May 2, 1916, at the outside; and that this should be considered the case without any consideration of the condition of the wall. In our opinion, such a position is entirely untenable. The work necessarily had to be done within the building ordinances of the City. None of the delay, incident to the procuring of the permit for the building of this fire-escape may properly be charged to the plaintiff. The wall was the defendant's wall, not the plaintiff's wall. From the evidence referred to, it would seem that the plaintiff made every reasonable effort to expedite the matter and assist the defendant in meeting the requirements of the Department of Buildings, so that the permit could be issued. In the course of the trial, in connection with his objections to certain evidence that was offered on this subject, counsel for the defendant

monday, it is the unofficial agreement of October 27, to which reference has already been made. This was signed by the plaintiff's agent, representing the plaintiff, and by the defendant. It is written up on the plaintiff's letterhead. It calls for an additional [illegible], which, according to the agreement, the defendant promises to pay "in order not to delay the work further". The defendant refers to this agreement as a "bribe". The plaintiff's position is that it was for the additional steel, occasioned by the requirements of the city inspectors of buildings. The permit for the work was duly issued by the department about a week later, and in less than a week after this the fire-escape was completed.

It is the contention of the defendant that under his contract the plaintiff was required to erect this fire-escape within a reasonable time; that such reasonable time was 30 days from May 5, 1912, at the outside; and that this would be considered the same without any consideration of the condition of the wall. In our opinion, such a position is untenable. The work satisfactorily had to be put within the building ordinances of the city. Proof of the delay, limited to the preceding of the permit for the building of this fire-escape was improperly or delayed by the plaintiff. The wall was the defendant's wall, not the plaintiff's wall. From the evidence referred to, it would seem that the plaintiff made every reasonable effort to expedite the matter and insist for defendant in making the requirements of the department of building, so that the work would be issued. In the course of the trial, in connection with his objections to certain evidence that was offered on this subject, counsel for the defendant

stated to the court, in substance, that under the contract the plaintiff had obligated himself to erect the fire-escape on this wall and that he was therefore obligated to do it, whether the City Building Department thought the wall was strong enough or not; that if the wall turned out to be hollow, as it did, it was, nevertheless, incumbent upon the plaintiff to fulfill the contract and put the fire-escape on the wall and if something was needed to strangthen the wall, before the City Department of Buildings would permit this to be done, it was up to the plaintiff to do it. The trial court disagreed with counsels objection, observing that it was up to the defendant to furnish the wall to put the fire-escape on and if the wall was weak and unfirm, it was the defendant's burden to strengthen it. In this the trial court was not in error. We therefore hold, necessarily, that the defendant had no basis for his claim by way of set-off for damages alleged to have been occasioned by the delay in the construction of the fire-escape.

The defendant further contends that the trial court erred in instructing the jury to include interest in their verdict. In this connection the defendant calls attention to the brass item, his claim being that the quantity of brass removed from the elevator walls did not belong to the plaintiff under the terms of the contract and specifications and that, therefore, the defendant should be credited with its value, and it is argued that this was a question of fact and was an unliquidated matter and that, therefore, the plaintiff's claim was not one on which interest should be allowed. The same contention wa made in connection with certain other items, of the claim which the defendant filed by way of set-off. If we consider that the plaintiff's claim was a liquidated claim, it could not be con-

stated on the count, in substance, that under the contract the plaintiff had obligated himself to erect the fire-escape on this wall and that he was therefore obligated to it, whether the City Building Department through the wall was strong enough or not; that if the wall turned out to be insufficient, as it did, it was, nevertheless, incumbent upon the plaintiff to fulfill the contract and put the fire-escape on the wall; if something was needed to strengthen the wall, before the City Department of Buildings would permit this to be done, it was up to the plaintiff to do it. The trial court disagreed with counsels objection, observing that it was up to the defendant to furnish the wall to put the fire-escape on and if the wall was not up to snuff, it was the defendant's duty to strengthen it. In this the trial court was not in error. The defendant had, consequently, that the defendant had no basis for its claim by way of set-off for damages alleged to have been occasioned by the delay in the construction of the fire-escape.

The defendant further contends that his trial court erred in instructing the jury to include interest in their verdict. In this connection the defendant makes attention to one more item, his claim being that the crediting of some interest from the attorney which did not belong to the plaintiff under the terms of the contract and specification and that, therefore, the defendant should be credited with its value, and it is argued that this was a condition of fact that was an ultimate issue matter and that, therefore, the plaintiff's claim was not one in point interest should be allowed. The same contention is made in connection with certain other items, at the claim which the defendant filed by way of set-off. If on remanding that the plaintiff's claim was a liquidated claim, it could not be con-

verted into an unliquidated claim merely by the defendant interposing certain items of an unliquidated nature, as a counter claim for damages, which claim was disallowed.

But the plaintiff succeeded in recovering only a part of the amount he was claiming, being unsuccessful to the extent of the amount claimed to be due under the supplemental contract and also an item of $40.00. Even on the theory that this might defeat the plaintiff's claim for interest on the amount he did recover, we are of the opinion that the judgment appealed from should not be disturbed. As we read the evidence in the record, the amount claimed by the plaintiff under the supplemental contract, was for the extra steel work occasioned by the weak wall and in that view of the case the plaintiff was entitled to recover that amount. Apparently the trial court instructed the jury to disregard that item on the theory that the consideration for it was time rather than extra materials and, therefore, that it was without consideration. The interest allowed by the jury is substantially the same in amount as the sum which the plaintiff claimed was due under the supplemental contract. We are of the opinion that substantial justice has been done between the parties and we shall, therefore, let the judgment appealed from, stand. Keeler v. Herr, 157 Ill. 57.

It is the defendant's contention that the trial court erred in overruling his objection to the testimony of the plaintiff's manager, referring to a conference he had with the defendant in December 1916, or January 1917, the contention being that this testimony related to a compromise. In our opinion, the ruling of the court referred to was not

varied into an unliquidated claim merely by the defendant introducing certain items or an unliquidated claim, as a counter claim for damages, which claim was disallowed.

But the plaintiff succeeded in recovering only a part of the amount he was claiming, being unsuccessful to the extent of the amount claimed to be due under the supplemental contract and also an item of $80.00. Even on the theory that this might defeat the plaintiff's claim for interest on the amount he did recover, we are of the opinion that the judgment appealed from should not be disturbed. As we read the evidence in the record, the amount claimed by the plaintiff under the supplemental contract, and for the extra steel work constructed by the week and in that view of the case the plaintiff has entitled to recover that amount. Apparently the trial court included the jury to disregard that item on the theory that the consideration for it was that rather than other materials and, therefore, that it was without consideration. The interest claimed by the jury is substantially the same in amount as the amount which the plaintiff claimed was due under the supplemental contract. We are of the opinion that substantial justice has been done between the parties and so said, therefore, the judgment appealed from, round. Bender v. Bank, 117 Ill. 87.

It is the defendant's contention that the trial court erred in overruling his objection to the testimony of the plaintiff's manager, referring to a conference in bad with the Internal in December 1919, or January 1917, the contention being that this testimony related to a conversation. In our opinion, the ruling of the court referred to was not

erroneous. The defendant's position apparently is that the $765.00, called for by the supplemental contract was a "holdup". It is thus referred to several times in the record. The testimony introduced by the plaintiff with reference to this conference tends to show that this was not the defendant's position at the time he was being asked to pay the bill just after the work was completed. The plaintiff's manager testified, with reference to this conference, that when he talked with the defendant about this account the latter said "He was willing to pay this bill as a total but he felt on account of this steel work he should have a deduction of $200.00." Furthermore, this testimony does not refer to any offer of compromise, in order to avoid litigation, but is rather in the nature of an admission of liability and that class of evidence is admissible. McKinzie v. Stretch, 53 Ill. App. 184.

It is the defendant's further contention that the verdict and judgment appealed from are erroneous, inasmuch as the defendant was not given credit for the value of the brass removed from the building by the plaintiff. In the first place there is no competent evidence in the record as to the value of the brass, assuming the defendant to be entitled to it. The only testimony offered as to its value was that of the defendant to the effect that he was offered $500.00 for it. It is true as the defendant points out, that although no objection was made to that testimony the court struck it out and asked the witness if he knew what the value was, and he replied that he only knew what he was offered. Of course, what the defendant was offered was not competent evidence of its value. But,

expense. The defendant's position apparently is that the $750.00, called for by the supplemental contract was a "holdup". It is thus referred to several times in the record. The testimony introduced by the plaintiff with reference to this conference tends to show that one was not the defendant's position at the time he was being asked to pay the bill just after the work was completed. The plaintiff's manager testified, with reference to this conference, that when he called with the defendant about this account the latter said "We are willing to pay this bill as a total but be that as interest of this total work be should have a deduction of $500.00." Furthermore, this testimony does not refer to any error of measuring, in order to avoid litigation, but is rather in the nature of an admission of liability and that also of evidence is admissible. McCormick v. Kirkman, 32 Ill. App. 198.

It is the defendant's further contention that the verdict and judgment rendered from one standpoint, inasmuch as the defendant was not ,then credit for the value of the items received from the building by the plaintiff. In the first place there is no competent evidence in the record as to the value of the items, assuming the defendant to be entitled to it. The only testimony offered as to its value was that of the defendant to the effect that he was offered $500.00 for it. It is true as the defendant points out, that although no objection was made to that testimony the court should if not had added the evidence it to know what the value was, and be satisfied that it only knew what he was offered. Of course, what the defendant was offered was not conclusive evidence of its value. And,

beyond that, we are of the opinion, that the question of whether the plaintiff was entitled to the brass, under the clause in the specifications, to which reference has heretofore been made, was a question of fact for the jury to pass upon, and we cannot say that in finding that the plaintiff was entitled to it, and therefore, that the defendant was not entitled to a credit for it, the jury found against the manifest weight of the evidence.

The final contention made by the defendant, in support of his appeal, is to the effect that the plaintiff was not entitled to the $765.00 called for by the supplemental contract. Assuming that to be the case, the defendant is not in a position to urge it as a reason for the reversing of this judgment, inasmuch as the court instructed the jury in accordance with that very contention, and apparently the jury eliminated the item, and it is not included in the judgment appealed from.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

beyond that, we see of the violence, that the character of weather the plaintiff was entitled to the bond, under the clause in the certificates, to which reference has already been made, was a question of fact for the jury to have said, and we cannot say that in finding that the plaintiff was entitled to it, and therefore, that the defendant was not entitled to a credit for it, the jury found against the undisputed weight of the evidence.

The final contention made by the defendant, in support of his appeal, is to the effect that the plaintiff was not entitled to the $750.00 paid for by the supplemental contract. Assuming that it be the case, the defendant is not in a position to deny it is an issue for the weighing of this judgment, because in the court referred the jury in accordance with that very contention, and clearly the jury eliminated the item, and it is not included in the judgment appealed from.

We find no error in the record and therefore the judgment of the municipal court is affirmed.

JUDGMENT AFFIRMED.

HILTON, P.J. AND O'CONNOR, J. DISSENT.

251 - 28086

(3524u)

IN RE ESTATE OF KATE E. BEGESCHKE, DECEASED,

On appeal of FRANK BEGESCHKE, Administrator,

Appellant,

v.

JOHN MOCKLER,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

232 I.A. 624

Opinion filed Dec. 26, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

John Mockler filed a claim against the Estate of Kate E. Begeschke, deceased, in the Probate Court of Cook County, and after a hearing in that court, the claim was allowed for the sum of $520.00. An appeal was prayed and allowed to the Circuit Court of Cook County, where a trial de novo was had, the issues being presented to a jury, resulting in a verdict in favor of the claimant for $500.00, and interest from the date of the filing of the claim in the Probate Court. Judgment was duly entered in the Circuit Court, on that verdict, from which the administrator has perfected this appeal.

John Mockler and Kate E. Begeschke, the deceased, were brother and sister. The claim on which the judgment appealed from was entered, was based on an alleged loan from Mockler to his sister. The only contention made by the administrator, in support of his appeal, is that the court

admitted im-material and prejudicial evidence, and permitted counsel for the claimant to cross-examine witnesses on matters which were not proper subject of cross-examination. The administrator of the estate of the deceased, was her husband, and the only other heir was an adopted daughter. The prejudicial matter complained of tended to show that the deceased and her husband were not on good terms; that the husband had filed divorce proceedings against his wife; that she lost her mind and finally committed suicide, and also that there were some peculiar circumstances about the adoption of the daughter referred to. All these matters were wholly immaterial to the issues which were presented to the jury for its consideration, and it is also clear that their admission would tend to prejudice the administrator, who was defending the claim, in the eyes of the jury. It is clear, therefore, that the objections which were interposed to these matters should have been sustained and they should have been kept out of the record.

We are of the opinion, however, that this judgment should not be disturbed. After a hearing in the Probate Court, the claim in question was allowed, and on the evidence which was material, and which was presented to the jury in the trial de novo in the Circuit Court, eliminating all the immaterial and prejudicial matter complained of, there could have been no verdict, which could be held to have been warranted, other than one in favor of the claimant.

The only issue of factpresented to the jury was the question of whether the claimant had loaned his sister $500.00, as he alleged. On that issue there was direct affirmative testimony from several witnesses, and no direct

admitted immaterial and prejudicial evidence, and permitted counsel for the claimant to cross-examine witnesses on matters which were not proper subject of cross-examination. The administrator of the estate of the deceased, was her husband, and he only other heir was a married daughter. The prejudicial matter complained of tended to show that the deceased and her husband were not on good terms; that the husband had filed divorce proceedings against his wife; that she lost her mind and finally committed suicide, and that there were some possible circumstances under the affairs of the daughter referred to. All these matters were totally immaterial to the issue which was submitted to the jury for its consideration, and it is to be above doubt that misleading evidence tend to prejudice the administrator, who was defending the claim, in the eyes of the jury. It is clear, therefore, that the objections which were interposed to these matters should have been sustained and they should have been kept out of the record.

In lieu of the equities, however, that this judgment should not be disturbed. After a hearing in the Circuit Court, the claim in question was allowed, and on the evidence which was material, and which was presented to the jury in the trial de novo in the Circuit Court, eliminating all the immaterial and prejudicial matter complained of, there can be no doubt, which could be held to have been warranted, after then one in favor of the claimant.

The only issue of fact presented to the jury was the question of whether the claimant had loaned his mother $500.00, as he alleged. On that issue there was direct affirmative testimony from several witnesses, and no direct

testimony to the contrary.

One Donovan, a lawyer, testified that on May 3, 1918, the deceased called at his office and consulted him concerning the making of her will, and on this occasion she told him that she had borrowed $500.00 from her brother John, which she was going to use to remodel her house, and that she wanted the witness to include in her will a bequest of $500.00 to her brother, so that she would be sure he would get the money. One Gillespie testified that on May 2, 1918, the claimant Mockler, who was an uncle of the witness, borrowed $100.00; that he, the witness, turned this money over to Mockler, in the rooming house where Mockler roomed; that the deceased, Kate E. Begeschke, was there at the time and in the presence of the witness, Mockler gave her $500.00. He testified further that she stated that she was going to do some work on her building and would use the money in that connection, and also that she had money on deposit in the bank at Harvard, Illinois, but was going to leave it there. On cross-examination the witness stated that when Mockler asked him for the $100.00 he told him he wanted it to make $500.00 to give to his sister. The witness further testified that Mockler did not get any paper from the deceased, when he gave her the money, and that Mockler repaid one half of his loan in about two weeks and the other half about ten days later. He also testified that the deceased asked Modkler to look after the work that was going to be done on her house, and see that it was done properly. This house was located in Chicago and the deceased and her husband lives in Kansas City, and she made the alleged loan, and arranged for the doing of the work in question on her house, on the occasion of a

testimony to the contrary.

One Johnson, a lawyer, testified that on May 3, 1919, the testatrix called at his office and summoned him witnessing the making of her will, and on this occasion she told him that she had borrowed $300.00 from her brother John, which she was going to use to provide her home, and that she wanted the witness to include in her will a bequest of $300.00 to her brother, so that she would be sure he would get the money. One Allsworth testified that on May 3, 1919, the claimant worker, who was an uncle of the testatrix, borrowed $100.00; that he, the witness, turned this money over to Hockler, in the rooming house where Hockler resided; that the deceased, Ruth E. Hagenbuck, was there at the time and in the presence of the witness, Hockler, gave her $300.00. He testified further that she stated that she was going to do some work on her building and could use the money in that connection, and also that she had money on deposit in the Bank at Harvard, Illinois, but was going to leave it there. On cross-examination the witness stated that when Hockler asked him for the $100.00 he told him he would-n't go more difficult to give to his uncle. The witness further testified that Hockler did not get any paper from the testatrix, that he got the money, and that Hockler thought was half of his loan in money too weak and the other half about two days later. He also testified that the deceased asked Hockler to look after the work that was going to be done on her house, and was that it was her own property. This house was located in Chicago and the deceased and her husband lived in Kansas City, and she made the alleged loan, and arranged for the doing of the work in question on her house, on the occasion of a

brief visit in Chicago.

One Zitella testified that in May, 1918, as a sub-contractor, he did some work on a building belonging to the deceased, and that he saw Mockler about the building a number of times, and that Mockler took out the building permit for the doing of the work. One Hicks testified that he was a tenant of the deceased, living in the building on which the work in question was done; that in May 1918, he talked with her about putting in some new foundation work; that she stated she was going down that afternoon to meet her brother John and that she intended getting the money from him. This witness then testified that he asked the deceased whether she wanted him to overlook the work for her, and she replied that her brother John would take care of that. He also testified that he saw Mockler around there nearly every day while the work was being done. On cross-examination, the witness fixed the date of this conversation with the deceased, when she said she was going down to get the money from her brother, as May 2, 1918, and he said he remembered the date because he gave the rent to her on that date.

On behalf of the estate it was stipulated that if a certain witness were present, he would testify to the effect that on May 3, 1918, the deceased drew $500 from the bank, where she had her account, in Harvard, Illinois, and that after such withdrawal, she had a balance of $1,085.00 in the Bank. One George Begeschke, a brother of the husband of the deceased, testified that when the deceased and her husband visited Chicago in 1918, they stopped at his home; that on

brief visit to Chicago.

One Sidonia testified that in May, 1918, as a sub-contractor, he did some work on a building belonging to the deceased, and that he saw another about the building a number of times, and that another took out the building permit for the doing of the work. The Sidonia testified that he was a tenant of the deceased, living in the building on which the work in question was done; that in May 1919, he talked with her about getting in some new foundation work; that she stated she was going down that afternoon to take her brother down and that she intended getting the money from him. This witness then testified that he asked the deceased whether she wanted him to overlook the work for her, and she replied that her brother John would take care of that. He also testified that he saw Doetler around there nearly every day while the work was being done. On cross-examination, the witness fixed the date of this conversation with the deceased, when she said she was going down to get the money from her brother, as May 7, 1919, and he also testified the date because he gave the test to her on that date.

On behalf of the orders it was explained that if a certain witness was present, he would testify to the effect that on May 7, 1919, the deceased came down from the bank, where she had her account, in Murphy, Illinois, and that after such withdrawal, she had a balance of $1,000.00 in her book. One George Hagemeier, a brother-in-law of the deceased, testified that when the deceased and her husband started to move in 1918, they stopped at his home; that on

that occasion the deceased told him she was making a contract for some foundation work on her cottage and that she would go to Harvard and get the money to pay for this work and turn it over to him; telling him the price would be $365.00. Zitella's testimony was that he received $360.00, for his work. George Begeschke testified that the deceased told him to see that the work was properly done; that she left his home on May 3, 1918 and came back the following day, saying she had been to Harvard to get the money, and at this time she turned over to him $365.00. The only other testimony was by Frank Begeschke and the adopted daughter, Clara Begeschke, to the effect that they had never heard either the deceased or her brother say anything about any loan having been made to her by her brother.

On the foregoing evidence, as already stated, we are of the opinion that no verdict of the jury could be permitted to stand, other than the one in favor of the claimant. Therefore, although we believe error was committed by the trial court in the matters complained of, we are further of the opinion that it was not such as would warrant a reversal of the judgment appealed from.

For the reasons stated the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

that although the defendant had his wife was making a commission for some foundation work on her mirrors and that she would go to Kayanna and get the money to pay for this work and then it over to him, telling him the price would be $125.00. Atkinson's testimony was that he received $200.00 for his work. Henry Hogendobler testified that the deceased told him to see that the work was properly done; that she left his home on May 6, 1910 and came home the following day, saying she had been to Kayanna to get the money, and on this that she turned over to him $125.00. The only other testimony was by Frank Hogendobler and his adopted daughter, Clara Hogendobler, to the effect that they had never heard anything the deceased or her brother say anything about her home having been made to them by her brother.

In the foregoing evidence, as already stated, we see of the evidence that no verdict of the jury could be permitted to stand, after from the one to favor of the plaintiff. Therefore, although we believe error was committed by the trial court in the matters complained of, we are further of the opinion that it was not such as would warrant a reversal of the judgment appealed from.

For the reasons stated the judgment of the district court is affirmed.

AFFIRMED.

WATSON, P.J. AND O'CONNOR, J. SITTING.

(3539a)

283 - 28559 28559

ANNA A. TERRUNE, Appellee, vs. YELLOW CAB COMPANY, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY. 232 I.A. 624

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for $9,000, entered by the Circuit Court of Cook County on January 13, 1923, in an action for damages for personal injuries. The jury found the defendant guilty and assessed plaintiff's damages at $12,000. Plaintiff remitted $3,000 from the amount of the verdict.

On April 19, 1922, about 2:30 o'clock p.m. plaintiff, accompanied by her five-year old daughter, was a passenger in a closed taxicab of defendant, a common carrier of passengers. Immediately before the accident the cab, driven by defendant's chauffeur, Wolf, was moving west on Wrightwood avenue, Chicago, in about the middle of the street, at a rapid rate of speed, approaching Racine avenue, a north and south street intersecting Wrightwood avenue at right angles. An auto truck was moving south on Racine avenue, also at a rapid rate of speed. It reached the intersection just before the cab. It had the right of way, and Wolf saw it approaching the intersection from his right. He testified in substance that he assumed the truck would continue going south in Racine avenue after reaching Wrightwood avenue; that, acting upon this assumption, he slightly checked the speed of his cab so as to allow the truck to pass in front of it; that when the cab was about even with the east curb line of Racine avenue, and the truck was well toward the center of the inter-

section, the driver of the truck suddenly turned it to the left to go east on Wrightwood avenue; and that, to "avoid an accident," he (Wolf) quickly turned the cab to the northwest and slightly into Racine avenue, and just "missed the truck." As to whether the truck actually turned east on Wrightwood avenue the testimony is conflicting. Plaintiff testified: "The truck continued south; there was no sudden turn of the truck to the east, that I noticed." Plaintiff also testified: "As we approached Racine avenue the driver was going at a very high speed * * and I had just made up my mind to tell him to slacken up when we reached Racine avenue, and the truck was coming south * * blowing its whistle." Both streets at and near the intersection were paved with asphalt, and within the intersection each was arched toward the middle, having a drain at each corner, about one foot lower than the level of the middle of the streets and the cross-walks. This construction produced an abrupt hill or elevation near the curbs at each corner. After the cab had passed behind the truck, Wolf abruptly turned the cab "southwest to get back into the street" (Wrightwood), and, then going at a speed of about 12 miles per hour, as he testifies, passed over the drain at the northwest corner, just missing the curb, and up and over the swell or hill of the west cross-walk. There was a severe jolt and plaintiff was bounced upward, and her head struck the top of the cab with such force as rendered her temporarily unconscious. Wolf testified that he stopped about 15 feet west of the corner, got out of the cab, asked plaintiff what he could do for her and went to a nearby shop and got her a glass of water; that the reason he stopped was, first, to find out whether he had hurt plaintiff, and, secondly, whether he had hurt his car; and that, subsequently, he drove plaintiff to her destination, about four miles away. Plaintiff testified in substance that at the time of the accident she was in excellent

section. The driver of the lumber wagon turned it to the left in an road on Tiverton avenue; and then, to "speak as matters," he (said) nervily turned the car in the excitement and eagerness into Dalton avenue, and just missed the crash." In a moment the truck suddenly turned out on Tiverton avenue the Tiverton is multitude. Finally continued: "The tragic consequence young there was no second turn of the wheel to the east, that I mentioned." Finally also testified: "In my opinion, taking among the driver was going at a very high speed." And I had just moved up my mind to tell him to slacken up when a wagon motor avenue, and the truck was coming north." Driving it delirious." Then where at and meet the intersection and turned left, reports, and within the same section such was argued having the minute, having a drink in quick succession, which was felt longer than the level of the minute of the drinks and the consequence. This constitution produced an effect still in elevation that the minds of such people, after the car had passed behind the truck, felt curiosity enough the car "continued to get back into the street" (continued), and, then going at a speed of about 15 miles per hour, in a direction, passed over the track in the Dalton street, just missing the curb, and up and over the wall or fill of the west cross-walk. There was a crash, jar and disorder and screaming upon, and for head struck the top of the car and with force so removed for temporarily unconscious. And testified that the engine stood 18 feet west of the motor, and out of the way. Which disorder what we will in for the car and was in a crash and not for a class of safety that the reason be observed was, first, to find out whether or for here disorder, and, secondly, whether he had lost his pay; the first, substantially, in have disorder to her testimony, which they often was. Finally testified in evidence that at the time of the disorder the car in crashing

health, though about three months pregnant; that when she regained consciousness self was giving her a glass of water; that she had pains on the top of her head, down her spine and across the small of her back; that on arriving at her friend's house she walked unassisted from the cab to the door; that while chatting with her friend her pains continued and about 3 o'clock p.m. she went to the bathroom and passed a large clot of blood; that she remained at her friend's house until about 7 o'clock p.m., when her husband called and took her home in an automobile; that her pains continued during the night and she could not sleep; that she felt dizzy and nauseated; that the family physician, Dr. Linnell, was telephoned for; that he arrived the following morning and began treating her; that during the day she had a second hemorrhage; that the pains in her abdomen, back and head kept increasing; that Dr? Linnell prescribed rest and quiet, gave her opiates, and she remained in bed; that her arms and back and other parts of her body became black and blue and her eyes discolored; that a day or two thereafter she had a third hemorrhage; that Dr. Linnell continued to treat her daily, endeavoring to prevent a miscarriage; and that about 10 days after the accident, her condition not improving, she was taken to a hospital and Dr. Linnell called in consultation Dr. Goldspohn (a well known surgeon specializing in obstetrics.) It further appears from the testimony of the two doctors that, after plaintiff arrives at the hospital, further efforts for two days were made to avoid performing an abortion; that finally it was decided, because of plaintiff's rapid pulse, continued pains, etc., that the performing of an abortion was necessary to save her life, which abortion was finally consummated by Dr. Goldspohn by the use of an instrument; that on the following day indications of a hemorrhage into the abdomen appeared and Dr. Goldspohn called

Smith, longer about these wrong premises; that when she re-
gained consciousness all was giving her a glass of water; that
the bed sunk on the top of her head, from her spine was across
the small of her back; that on arriving at her friend's house
she walked unassisted from the cab to the door; that while
chatting with her friend her motor centre contracted and about 4 o'clock
p.m. she went to the bathroom and passed a large clot of blood;
that she remained at her friend's house until about 7 o'clock
p.m., when her husband called and took her home in an automobile;
that her motor centre contracted during the night and she could not sleep;
that she felt tired and nervous; that the family physician, Dr.
Linnell, was telephoned for; that he arrived the following morning
and began treating her; that during the day she had a second
hemorrhage; that the pains in her abdomen, back and head kept in-
creasing; that Dr. Linnell prescribed rest and quiet, warm bar
baths, and she remained in bed; that her mere touch and other
parts of her body became black and blue and her eyes discolored;
that a day or two thereafter she had a third hemorrhage; that Dr.
Linnell continued to treat her daily, endeavoring to prevent a
miscarriage; and that about 10 days after the occurrence, her con-
dition not improving, she was taken to a hospital and Dr. Linnell
called in consultation Dr. Dalrymple (a well known surgeon
specializing in obstetrics.) It further appears from the
testimony of the two doctors that, after plaintiff arrived at
the hospital, further efforts (or two more) were made to avoid
performing an abortion; that finally it was decided, because of
plaintiff's mental pulse, continued pains, etc., that the per-
formance of an abortion was necessary to save her life, which
abortion was FINALLY PERFORMED by Dr. Dalrymple by the use of
an instrument; that on the following day had children of a
neighboring into the sickroom and Dr. Dalrymple called

Dr. Byford in consultation; that thereupon, to stop the hemorrhage, a second operation was performed, consisting of cutting through the outer walls of the abdominal cavity, stopping the hemorrhage and cleaning out the abdomen; and that it was ascertained during the second operation that there was a rupture of the womb causing the hemorrhage. It further appears that plaintiff was in the hospital for about four weeks; that she was confined to her bed for about the same length of time after she was taken home from the hospital; that after her return home Dr. Linnell saw her every day for two weeks and every other day for about a month; and that since July, 1922, she has not been under the care of any physician. Plaintiff further testified that at the time of the trial, December, 1922, she had not regained her former health and strength; that she still had severe pains; that she suffered from painful menstruation, a condition not existing before the accident; that she weighed 140 pounds, while before the accident she weighed 170 pounds; and that there was tenderness and pain in the region of the 11th and 12th ribs near the spine, the pain being more noticeable when she leaned over.

Defendant's counsel contend that the evidence does not establish that the driver of the cab was guilty of any negligence. We think it does. The driver of the cab approached the intersection and the truck at too great a speed. He allowed the moving cab to get too close to the truck, which had the right of way. He took a chance on the assumption that the truck would continue going south at the same rate of speed and would not turn to the left into Wrightwood avenue. Assuming that the truck did so turn, as he says, he was suddenly confronted with an emergency, but it was one of his own negligent creation. To avoid a collision with the truck he was obliged to suddenly turn the cab to the right into Racine avenue, and, just missing the truck, he abruptly turned the cab back into Wrightwood

Dr. Lytard in consultation, that therapeutic, to stop the haemorrhage, a second operation was performed, consisting of cutting through the outer wall of the abdominal wall, exposing the haemorrhage and clamping off the ruptured vessel. Not that it was necessary during the second operation that there was a tumour of the size making the haemorrhage. It further appears that probably one in the hospital for about four hours after the one machine is not set for about the same length of time after the patient has taken home from the hospital, that after her return from Dr. Lytard was her every day for two weeks and every other day for about a month; and that right, 1947, she has not been under the care of any physician. Plaintiff further testifies that at the time of the trial, however, 1951, she had not regained her former health and strength; that she still had severe pains; that she suffered from painful menstruation, a condition not existing before the accident; that she weighed 140 pounds, while before the accident she weighed 170 pounds; that there was tenderness and pain in the region of the 12th and 11th rib near the spine. She made being more noticeable than the lower ribs.

Defendant's counsel contend that the evidence does not establish that the injury of 1941 was the proximate cause of the malignancy. We think it does. The doctor of the 1941 operation the injunctions and the tumor of the ground a cancer. In allowed the saving rule is not too plain to the court, where the the right of way. We look a chance to the injunction that the cause which continue during until the most that it spread and yield not sign to the left lung (primary cancer). Assuming that the cross air is true, so be sure, the malignancy continued with no remission, but it was one of its own multiplied growths. To avail a criticism that the tumor in the origin is unknown when the rule is the right lung cancer cause, and, just assuming the tumor, no evidence showed the not back into metastasis

avenue, and, without checking its speed or bringing it to a stop, he negligently ran over the uneven portions of the street (which he saw or should have seen) at the northwest corner of the intersection, at such a rate of speed that the cab was severly jolted and plaintiff injured. And we do not think that there is any merit in counsels' further contention that plaintiff was guilty of contributory negligence, barring a recovery. In Swanlund v. Rockford & Interurban Ry. Co., 305 Ill. 339, 346, it is said: "The negligence of the driver in sole charge of a vehicle cannot necessarily be imputed to a passenger in the vehicle. A passenger in the vehicle, if he is caring for his own interests and safety, should, when he learns of a threatened accident and has an opportunity to avoid it, warn the driver of the vehicle." Clearly, under the facts and circumstances in evidence, it cannot be said that plaintiff learned of any threatened accident in time to warn the driver of the cab, or had any opportunity of avoiding the accident which actually occurred.

Defendant's counsel also contend that no serious injury was proximately produced by what happened to plaintiff while a passenger in the cab, that the verdict of the jury was so clearly excessive as to indicate passion and sympathy for plaintiff on the part of the jury, and that the judgment entered upon the remittitur is likewise excessive. The case was tried on plaintiff's behalf on the theory that the abortion necessarily performed upon plaintiff in the hospital about 12 days after the accident, the rupture of her uterus, and the hemorrhage which followed necessitating the second operation, were all to be attributed to the severe injuries which she received when pregnant and while a passenger in the cab. Defendant's counsel argue in substance that it was not necessary to perform the abortion, that it was not resorted to because of the injuries plaintiff received while in the cab, but because of the predisposition to miscarriage, and that the abdominal

because of the injuries plaintiff received while in the car, but because of the predisposition to miscarriage, and that the abdominal

operation was made necessary by reason of a puncture of her uterus effected through the negligence of the operator at the time of the performance of the abortion. After careful examination of the present record we do not think that the evidence sustains counsels' contentions, or arguments, or any parts thereof. We think that the jury were fully warranted in believing, as from their verdict they probably believed, that the injuries plaintiff received in the cab brought about a condition which necessitated the performance of the abortion, that the same was not negligently performed, that plaintiff did not have a predisposition to miscarriage, and that the second operation was necessary to save her life. Furthermore, it appears that plaintiff used reasonable care in the selection of the physician first called to attend her. Dr. Linnell was the family physician, in whom she had confidence; he was in good repute as a physician; and it was natural for her to call him, who had been her physician for about 20 years and who had attended her at the birth of her living daughter. He, for her, called Dr. Goldspohn in consultation after she was taken to the hospital, and the latter was a skillful and able surgeon of many years' experience in obstetrical cases. Even if mistakes were made in believing the performance of an abortion to be necessary, or in the operation, such mistakes cannot be availed of by defendant (Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 276; Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, 25; Variety Mfg. Co., v. Landaker, 227 Ill. 22, 25; Village of Bethany v. Lee, 124 Ill. App. 397, 399.) While it was plaintiff's duty, after she received the injuries in the cab, to use reasonable care to effect a speedy and complete cure of those injuries, and, to that end, to also use reasonable care to employ physicians of ordinary skill and experience to treat her, she was not required to employ the highest medical skill which might be found. And, as said in the Saxby case, supra,

operation was made necessary by reason of a necessity of her nature different somewhat the magnitude of the difference in the time of the performance of the character. Only serious consideration of the problem should we do not find that the evidence supplied essential contradiction, or suggested, at any point doubt. In United the jury were fully satisfied in exercising, as from their verdict they probably believed, that the injurious physical conditions in the job already [illegible] contributing which [illegible] the performance of the operation, that the work had not negligently performed, that similarly did not have a predisposition to [illegible] injury, and that the actual activities was unnecessary to give her life. Furthermore, it appears that intensive and [illegible] were in the education of the physician first called to attend her. Dr. Linnell was the family physician, in whom she had confidence; he was a good friend as a physician; and it was natural for her to call him, who had been her physician for years and who had attended her at the birth of her living daughter. He, for her, called Dr. Bridgeman in consultation after she was taken to the hospital, and the latter was a medical and also surgeon of many years' experience in obstetrical cases. Even if mistakes were made in delivering the performance of an operation to be necessary, or in the operation, such mistakes cannot be attributed to negligence (Dunning Dyer [illegible], v. Leary, 219 U.S. 276, 279; Indiana Trust Co. v. Jones, 147 Ind. 36, 39; Jackson v. [illegible], 147 Ind. 47, 50; Pittsburg C. C. & St. L. R. R. Co. v. [illegible], 147 Ind. 111, 117, 118; Pittsburg C. C. & St. L. R. R. Co. v. [illegible], 154 Ind. 462, 466.) While it was plaintiff's duty, after she received the injuries in the early in her convalescence, to refrain a speedy and complete cure of those injuries, and, in that end, to also use reasonable care to avoid physicians of authority which had experience in treat her, she was not required to employ the skillful with which might be found. And, in view of the [illegible] case, [illegible]

(p. 276): "All the law required was that she exercise such prudence as men and women of ordinary judgment, under like circumstances, would exercise in the choice of physicians and the means to be used to effect a recovery. She was not an insurer, bound to act at her peril, and if she exercised reasonable care in selecting her physicians and in the employ of other means for her recovery, if her physicians made a mistake in the treatment applied by them to her or the means employed failed to effect a cure, then she may recover for the entire injury which she has sustained, as the law (if the injured person uses ordinary care in selecting a physician and in the employment of the means to effect a cure) regards an injury resulting from the mistake of a physician or from a failure of the means employed to effect a cure as a part of the immediate and direct damages which naturally flow from the injury." Nor can it avail defendant under the facts disclosed to urge the excessiveness of the verdict because of plaintiff's predisposition to miscarriage, if any there was. One can recover for the full results naturally flowing from injuries received, even though there was pre-existing disease, weakness or predisposition. (Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 280; Chicago Union Traction Co. v. May, 221 Ill. 530, 537; Village of Bethany v. Lee, supra.)

It is also urged that the trial court erred in permitting certain of plaintiff's witnesses to answer certain questions. We do not think that the alleged errors, if any, were such as warrant a reversal of the judgment.

Complaint is made that the court allowed answers to certain long hypothetical questions asked of plaintiff's expert witnesses, Doctors Linnell, Goldspohn and King. The argument is that, the particular matters inquired about not being disputed, the questions put by plaintiff's attorney to the witnesses did not contain all the facts and, hence, the jury were probably misled by the opinion expressed. We have examined the questions and do not

(p. 474): "All the Law requires is that the particular act
performed be such that reason of ordinary judgment, under like cir-
cumstances, would conclude in the nature of probabilities, that the
means to be used to effect a contrary. The act not so intended,
based on not so far remote, and if the consequent probability arising
in estimating her capabilities and in the exercise of other circum-
stances, it has proceeded no more a question in the treatment
applied by them in for or the proximate analogous fields to effect a
cure, then she may recover for the entire injury which she has
sustained, or the law if the injured person also contributory cause
in aggravating a condition and in the development of the disease to
effect a cure) requires an injury resulting from the absence of a
physician or from a failure of the person employed to effect a cure
as a part of the immediate and direct damage which naturally flow
from the injury." Men can in small referencing under the facts dis-
closed to urge the commencement of the running period of plain-
tiff's prescription in misdiagnosis, if any there was. (or not
recover for the full prescribe monetary (losing from injurious) re-
ceived, even though there was preexisting disease, weakness or
predisposition. (Delaney v. Lu. v. Cooper, 414 Ill. 74; and;
Chicago Union Traction Co. v. Fox, 221 Ill. 84, 87; Village of
Bellmont v. Lee, supra.)

It is also argued that the trial court erred in giving/ing
certain of plaintiff's witnesses to answer hypothetical questions. We
do not think that the charges errors, if any, were such as warrant
a reversal of the judgment.

Complaint is made that the court allowed experts to
participate hypothetical questions based on plaintiff's counsel
witnesses, Doctors Jarvis, Gallagher and Cox. The argument is
that, the questions contain assumed facts not being disputed, the
questions put to plaintiff's witnesses in the alternative did not
contain all the facts and, hence, the jury were improperly misled by
the opinion expressed. We have examined the questions and do not

think that the court committed any reversible error in allowing answers thereto. Some of the facts stated in the questions were disputed, and while all the facts in evidence were not included, yet the essential facts according to plaintiff's theory of the case, and which her evidence tended to sustain, were contained in the questions. This is all that was required. (Howard v. People, 185 Ill. 552, 560; Chicago & Eastern Illinois R. Co. v. Wallace, 202 Ill. 129, 133; People v. Genry, 297 Ill. 608, 615; Napier v. Greenzweig, 256 Fed. Rep. 196, 203.) If defendant's attorney believed that all the relevant facts, which might have a bearing upon the opinions of the witnesses, were not included in the questions, such omitted matters should have been brought to the attention of the witnesses at the time upon cross-examination. (Chicago & Eastern Illinois R. Co. v. Wallace, 202 Ill. 129, 135; Chicago City Ry. Co. v. Bundy, 210 Ill. 39, 46.) In Opp v. Fryer, 294 Ill. 538, cited by defendant's counsel to sustain their point, none of the facts of that case, unlike the present case, was disputed, and it is said in the court's opinion (p. 546): "If the facts are disputed the party examining the witness may include in the hypothesis only those facts which the evidence on his side tends to prove, and it will be for the jury to say whether the facts stated have been proved or not and accept or reject the opinion accordingly."

It is also contended that the giving of instruction No. 3, offered by plaintiff and referring to the question of damages, constituted reversible error. The argument is that the instruction did not embody the thought that plaintiff's injuries must be the proximate result of the accident. In our opinion there is no merit in the contention. In another given instruction, offered by defendant, the jury were plainly told that plaintiff's injuries must be shown to have been the result of the occurrence complained of. It is the rule that instructions must be considered as a series, and the fact that an element is lacking in one instruction, which does

think that the error complained of was in no way prejudicial to the defendant's interests. None of the facts stated in the instructions were disputed, and could all the jurors in attendance have been impaneled, yet the instructions would have been the same. In the case, as we view it, the error complained of was not material to the defendant. This is all that we consider.

Judgment affirmed.

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[1] Cf. Lyons v. Illinois Central R. R. Co., 168 Ill. 271, 48 N. E. 80; Illinois Central R. R. Co. v. Welch, 52 Ill. 183; Illinois v. Phelps, 29 Ill. 129; Illinois v. Fisher, 97 Ill. 441, 446; Illinois v. Greenwalt, 148 Ill. 488, 36 N. E. 1; cf. Jackson's Criminal Law, Sec. 1, 2, 3, 4.) If defendant's attorney believed that the relevant facts, which might have a bearing upon the opinions of the witnesses, were not contained in the questions, such matter should have been brought to the attention of the attorneys by the time upon cross-examination. Illinois v. Fisher, Illinois v. Phelps, supra, 97 Ill. 139, 146; Illinois v. Greenwalt, 148 Ill. 488, 36 N. E. 1; Illinois v. Gray, 148 Ill. 36, 35 N. E. 1; cf. Illinois v. Lyons, 168 Ill. 271, 48 N. E. 80, where by defendant's counsel to assume their point, upon at the trial of that case, neither the previous case, nor objected, nor it appeared in the record before us, nor. The fact was disputed the party complaining was allowed any benefit in the objections only where facts which the evidence in the case tends to prove, and it will be for the jury to say whether the facts relied upon have been proved or not, and thereby or reject the opinion accordingly."

It is also contended that the giving of instruction No. 5, offered by plaintiff and refusing to give instructions offered by defendant prejudiced the defendant's rights. The answer is that the instructions did not convey the idea that plaintiff's injuries were in the proximate result of the accident. In our opinion there is no error in the contention. In another given instruction, offered by defendant, the jury were clearly told that plaintiff's injuries were to have been the result of the accident complained of. It is the rule that instructions must be considered as a whole, and the fact that an element is lacking in one instruction, which does

not direct a verdict, is not ground for reversal, if the lacking element is supplied by other instructions. (Beidler v. King, 209 Ill. 302, 314; Chicago Union Traction Co. v. Miller, 212 Ill. 49, 56.) And we do not think that the trial court erred in refusing to give refused instruction No. 1, offered by defendant. It contained several assumptions unwarranted by the evidence and was otherwise faulty.

Finding no reversible error in the record the judgment of the Circuit Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

not direct a verdict, is not ground for reversal, if the judgment ultimate is supported by other instructions. (Wabash v. Adams, 209 Ill. 544, 554. Chicago Junction Ry. Co. v. Hines, 219 Ill. 43, 50.) And so in our opinion the trial court erred in refusing to give proper instructions in, i. e. of law as defined. It withdrew material questions unwarranted by the evidence and not at issue herein.

Finding no reversible error in the record the judgment of the Circuit Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

(354 0a)

292 - 28568

EMERSON B. ROBINSON and CHICAGO TITLE & TRUST COMPANY, Trustee, Appellees,	APPEAL FROM
vs.	CIRCUIT COURT,
CHARLES G. MILLER et al.,	COOK COUNTY.
On Appeal of KURT R. BNAK, individually and as trustee, Appellant.	232 I.A. 625

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure entered by the Circuit Court of Cook County on December 16, 1922. The trust deed in question was executed on September 1, 1920, by defendants, Charles G. Miller and wife, and secured the payment of their five notes, of even date, for $5,000 each. The first note matured on January 1, 1921, and the others on or before September 1, 1923, all drawing interest. They were given in part payment of the purchase price of certain real estate, improved with an apartment building, in Chicago, Illinois.

By the trust deed, in usual form, said defendants covenanted, inter alia, that they would pay the indebtedness as provided in the notes, also all taxes levied on the premises "as and when the same shall become due and payable," and that they would not suffer any mechanic's lien to attach to the premises. It provided that, in case of default in the payment of any note, or accrued interest thereon, and such default continued for 30 days, the whole indebtedness should at once become due and payable, at the election of the holder "without notice;" that upon the filing of a bill to foreclose the court might

[illegible]

[illegible]

[illegible]

appoint a receiver without notice; and that all expenses incurred in complainant's behalf, "including reasonable solicitors' fees" might be paid by complainant and should become so much additional indebtedness, etc.

The bill was filed on June 30, 1921. It is alleged that default has been made in the payment of $3,500, on the note falling due on January 1, 1921, and of accrued interest thereon; that the general taxes for the year 1920, levied and assessed against the premises and amounting to $1,300, have not been paid; that notice of a mechanic's lien has been filed against the premises in the sum of $600; and that, by reason of these facts the complainant, Robinson, as the holder and owner of all of the notes, has elected to declare, and hereby does declare, the whole of the indebtedness immediately due and payable. It is further alleged that Charles E. Cannon now appears to be the record owner of the premises, subject to the trust deed; that on or about September 4, 1920, Miller and wife executed another trust deed conveying the premises to Kurt R. Beak, as trustee, to secure 18 notes therein described, - 17 being for $250 each and 1 for $4,250, all executed by Miller and by him endorsed; that the holders and owners of said 18 notes are unknown to complainant; and that the general taxes for the year 1921 are now a lien upon the premises. The bill prayed that Miller and wife, Kurt R. Beak, individually and as trustee, the unknown holders and owners of said 18 notes, and other parties, be made defendants, and also that a receiver <u>pendente lite</u> be appointed.

On the day the bill was filed an application for the appointment of a receiver was made and notice given. While this application was pending Beak paid said taxes for the year 1920, and on July 13, 1921, filed an affidavit alleging that fact, and also that "the mechanics' lien claim, heretofore filed against said real estate, in the sum of $600, has been duly released of record." On the same day Beak, Miller and wife, and Cannon "by Kurt R. Beak,

applied a restrictive clause method; and that all expenses incurred in complainants' behalf, including necessarily solicitors' fees, might be paid by complainants and should follow so much additional indebtedness, etc.

The bill was filed on June 3, 1921. It is alleged that default has been made in the payment of [illegible], on the note falling due on January 1, 1920, one of original indebtedness thereon; that the general taxes for the year 1920, interest and assessed against the premises and amounting to $1,000, were not been paid; that a notice of a mechanic's lien has been filed against the premises on the 22nd of 1920; and that, by reason of these facts the complainant, [illegible] Ikman, as the holder and owner of all of the notes, has elected to declare, and hereby does declare, the whole of the indebtedness immediately due and payable. It is further alleged that [illegible] Ikman now appears to be the record owner of the premises, subject to the trust deed; that on or about September 4, 1920, Milton and wife executed another trust deed covering the premises to Burt H. Dean, as trustee, to secure $2,000 of notes described, - 17 being for $100 each and 1 for $1,000, all executed by Milton and by him endorsed; that the holders and owners of said $2,000 are unknown to complainant; and that the general taxes for the year 1921 are now a lien upon the premises. The bill prays that Milton and wife, Burt H. Dean, trustee and as trustee, the unknown holders and owners of said $2,000, and other lienors, be made defendants, and that a receiver pendente lite be appointed.

On the day the bill was filed an order was entered for the appointment of a receiver was made and notice given. Notice this application was duly served upon said trustee for the year 1920, and on July 14, 1921, filed an affidavit alleging that [illegible], and alleg that the mechanics' liens claim, but [illegible] that the [illegible] estate, in the sum of $800, was [illegible] of [illegible]." On the same day [illegible], Milton and wife, and [illegible] Burt H. Dean,

his attorney in fact," filed their petition, verified by Beak, praying that some one of them be allowed to give a bond in lieu of the appointment of a receiver and that Beak be permitted to retain possession of the premises and continue to collect the rents, pending the litigation. It is alleged in the petition that Cannon is a resident of California, and that he "has heretofore constituted Kurt R. Beak, his authorized agent and attorney in fact for the purpose inter alia of using 'such measures, legal and equitable, as in his (Beak's) discretion may be deemed proper and necessary to enforce the payment or the security of such rents, etc., or to secure and maintain possession of said premises.'" Beak's bond, with surety, in the sum of $10,000, was subsequently filed and approved and complainant's motion for a receiver was denied. After the present appeal had been docketed in this appellate court, complainant made a motion for the appointment by this court of a receiver of the premises, basing his motion on the alleged fact that the general taxes assessed against the premises for the year 1921, and due and payable on or before April 30, 1922, had not been paid. The motion was denied.

Miller and wife and Beak, on August 6, 1921, filed an answer to the bill, denying some of the material allegations thereof, and alleging that Beak had paid the 1920 taxes "in due season" and that the same were "no longer a lien" on the premises; that on or about January 10, 1921, "in consideration of the guarantee of the note maturing January 1, 1921, by Kurt R. Beak, and in accordance with arrangements then and there effected," complainant agreed to extend the time of payment of said note, "provided payments of $500 on account of principal were made every 60 days, and the balance paid on or before one year after the date thereof;" that defendants have complied with the terms of said "extension agreement;" that "as a part of said extension agreement" it was agreed between complainant and Beak that, in

-2-

his attorney in [illegible] (the Duke [illegible]), stating he [illegible], [illegible] that there was no [illegible] to give a bond in lieu of the injunction of [illegible] and that bond be restored to [illegible] pending the litigation. It is alleged in the petition that Gibson is a resident of Louisiana, and that he [illegible] before commencing that [illegible], his [illegible] and attorney in fact for the [illegible] of [illegible], legal and equitable, in the [illegible] [illegible] be [illegible] and necessary to enforce the [illegible] of [illegible] of such [illegible], or to secure and maintain possession of said property." Bank's bond, with surety, in the sum of $[illegible], was subsequently filed and [illegible] and [illegible]'s motion for a receiver was denied. After the [illegible] appeal had been [illegible] in the [illegible] court, [illegible] motion for the [illegible] by this court of a writ of [illegible], [illegible] the motion on the alleged fact that the [illegible] [illegible] [illegible] the [illegible] for the year 1921, and the [illegible] on or before April 20, 1921, had not been paid. The motion was denied.

Pending the writ [illegible] on [illegible] 6, 1921, filed an answer to the bill, [illegible] some of the [illegible] allegations thereof, and [illegible] that bond had been [illegible] "in due manner" and that the [illegible] "be longer a lien" on the property; that on or about January 10, 1921, the consideration of the [illegible] of the note [illegible] January 1, 1921, by [illegible] and in [illegible] with [illegible] that [illegible] [illegible] payment against [illegible] [illegible] [illegible] [illegible] provided payment of [illegible] on account of [illegible] [illegible] every 30 days, and the [illegible] note on or before [illegible] [illegible] date thereof; that [illegible] [illegible] [illegible] of said [illegible] [illegible] that the [illegible] [illegible] [illegible] [illegible], in

the event Beak made good in his guaranty, the said note of $5,000 "was to be turned over to said Beak uncancelled but bearing the clause to the effect that it was subrogated to the payment of the other notes described in and secured by said deed of trust;" that on or about June 18, 1921, said Beak, desiring to honor his guaranty, inquired of complainant the amount due on said note, and upon being advised on June 24, 1921, as to said amount, "tendered to solicitors for complainant (prior to the institution of this action) the amount then claimed to be due, but that said solicitors refused to accept such payment so tendered, and/or to deliver said note to the defendant Beak uncancelled;" and that Beak has at all times been ready, willing and able to pay to complainant, or upon his order, the sum so tendered, and still offers to pay said sum so due and owing upon said note in accordance with said extension agreement.

No replication was ever filed to the answer. Such of the other defendants as were personally served were defaulted. Service was had on defendant Cannon by publication and by the clerk mailing notice, and upon the unknown holders and owners of the 18 notes by publication. In the publication notice it was recited that summons had been issued against defendants returnable on the 3rd Monday of July, 1921, (July 18), and that the suit was still pending. In the certificate of publication, filed September 30, 1921, it was stated that the first publication was made on July 26, 1921, and the last on August 16, 1921. Cannon and said unknown holders and owners were defaulted by order entered on November 4, 1921.

Thereafter, on motion of complainant and after notice, the cause was referred without objection to a master in chancery, before whom considerable evidence, oral and documentary, was introduced by both parties. His report was filed on August 28,1922, in which he found that all the material allegations of the bill had

been proved, and recommended the foreclosure of the trust deed for the amount of $28,101.23, which included $2,500, as fees for complainant's solicitors, and which amount for fees the master found to be a reasonable amount under all the facts in evidence. The objections of defendants, Beak and Miller and wife to the report were ordered to stand as exceptions, which, except those to three unimportant findings, were overruled by the court, and the report was confirmed in all other respects.

The first point raised by counsel for appellant, Beak, is that the decree is erroneous in that the court did not have jurisdiction of all of the parties defendant, as found in the decree. The argument is that the record discloses that defendant, Charles E. Cannon, was at the time of the filing of the bill the owner of the premises subject to the trust deed in question; that he was a necessary party, as were also the unknown holders and owners of said 18 notes secured by the second trust deed and the unknown owner or owners or parties interested in the premises; that all of these defendants were defaulted wrongfully on a publication notice which was published for the first time 8 days after the return day named in the summons and in the notice, which notice was founded upon insufficient affidavits and the certificate of publication improperly certified to. Even assuming, but not deciding, that the publication notice was defective in any of these particulars, we do not think that appellant, who appeared and answered the bill, is in any position to raise the point. Neither Cannon nor the other defaulted defendants are complaining and they only can complain. (Fergus v. Tinkham, 38 Ill. 407, 410: Hinton v. Knott, 134 Ill. App. 294, 296; Short v. Raub, 81 Ill. 509, 510; Brown v. Miner, 128 Ill. 148, 154; Culver v. Gougle, 165 Ill. 417, 419; Gottschalk v. Noyes, 225 Ill. 94, 99; Bonham v. Joyce, 257 Ill. 112, 117.) In the Bonham case, last cited, it is said: "Appellants' com-

been proved, and consequently the plaintiff's of the trust fund for the amount of $48,[illegible], which, including $1,000, is been for complainant's solicitor, and which amount for fees the master found to be a reasonable amount upon all the facts in evidence. The objections of defendants, both our client and wife to the report were argued to court as exceptions, which, except those to three unimportant items, were overruled by the court, and the report was confirmed in all other respects.

The first point raised by appellant for opposition.

Here, in that the terms in controversy we find the court did not have jurisdiction of all of the possible defendants, as found in the decree. The opinions in this the court discharge that defendant, Charles E. Dawson, not of the time of the filing of the bill the owner of the premises subject to the trust fund in question; that he was a necessary party, as was also the unknown children and heirs of said in main remainder in the second trust fund and the unknown heirs or persons or persons interested in the premises; that all of these defendants were directly or indirectly in a position which was prejudicial for the first time a year after the filing the suit in the decision and in the result, which decree was insufficient effectively on the certificate of jurisdiction incorporate certified to. Then answering, but not insisting, that the notification notice was defective in any of these particulars, we do not think that appellant, who appealed and obtained the rule, is by any position to raise the point. Within Dawson nor the other defendant defendants are complaining and they only can complain. (Ferrer v. Tinsley, 2a Ill. 407, 410; Hanson v. Dent, 14a Ill. 14a, 19a; Jones v. Ward, 61 Ill. 107, 110; Brown v. Ryan, 140 Ill. 144, 150; Cooper v. Cowen, 14a Ill. 417, 419; Quinnebaugh v. Bowen, 203 Ill. 94, 97; Dawson v. Joyce, 207 Ill. 124, 127.) In the Dawson case, last cited, it is said: "Appellants' complaint

plaint is, that some other defendant or defendants who were made parties under the name of 'unknown owners' were not properly served. Without deciding whether the certificate of publication would be sufficient if called in question by some one who was injuriously affected thereby, we think a sufficient answer to appellants' contention in this regard is, that whatever error may have been committed in respect to the certificate of publication, it does not injure appellants and they cannot complain of it." Furthermore, it appears in the present case that Beak was the authorized agent of the non-resident defendant, Cannon, to "secure or maintain possession of said premises," and also that Beak was the holder and owner of the 18 notes secured by the second trust deed.

Counsel for Beak also contend that the decree should be reversed because the case was not properly referred to the master. It is argued that at the time the order of reference was entered, no replication having been filed to the answer of Beak and Miller and wife, issue had not been joined, (Sec. 39 Chancery Act) and, hence, the reference was premature, and further that the language used in the order - merely referring the cause "to master A. A. Munger" - was insufficient. In our opinion, there is no merit in the contention or in the argument. It does not appear that when the order of reference was entered the solicitors for Beak, although they had notice, objected to the reference or to the language of the order. On the contrary the order was treated as a valid one, and subsequently evidence was introduced by both parties and heard by the master by virtue thereof. Under such circumstances the informality in the language of the order cannot here be complained of by Beak, (Hawley v. Simons, 157 Ill. 218, 224, Freese v. Glos, 248 Ill. 280, 282); especially where it does not appear that any injustice resulted from such informality. (Girard Life Ins. Co. v.

plaint is, that [illegible] the same parties under the name of 'unknown owners' were not properly served. Without deciding whether the [illegible] of publication would be sufficient if called in question by some one who was injuriously affected thereby, we think a sufficient answer to appellants' contention in this regard is, that whatever error may have been committed in respect to the [illegible] of publication, it does not injure appellants for they cannot complain of it. Furthermore, it appears in the present case that [illegible] the authorized agent of the complainant [illegible], to "remain or maintain possession of said premises," [illegible] the holder and owner of the [illegible] by the second trust deed.

Counsel for [illegible] also contend that the decree should be reversed because the sale was not properly reported by the master. It is argued that at the time the order of reference was entered, no replication having been filed to the answer of [illegible] and wife, Lewis had not been [illegible], [illegible] the reference was premature, and further that the language used in the order - merely referring the cause "to master [illegible]" - was insufficient. In our opinion, there is no merit in the contention or in the argument. It does not appear that when the order of reference was entered the [illegible], although they had notice, objected to the reference or to the language of the order. On the contrary the cause was treated as a [illegible], and subsequently evidence was introduced by both parties and heard by the master by virtue thereof. Under such circumstances the informality in the language of the order cannot now be complained of by them. (Ensley v. Higgins, [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]); especially where it does not appear that any injustice resulted from such informality. (Oxford Life Ins. Co. v.

Cooper, 51 Fed. Rep. 332, 335.) And, under the circumstances, the cause being treated by the parties as at issue, the filing of a replication by complainant must be held to have been waived. (Piot v. Davis, 147 Ill. App. 203, 204, affirmed 241 Ill. 434, 439; Marple v. Scott, 41 Ill. 50, 61; Jones v. Neely, 72 Ill. 449, 451.)

Counsel also contend that the evidence shows that there was an agreement, entered into between complainant and Beak, whereby complainant extended the time of payment of the note, maturing on January 1, 1921, for one year, and that, therefore, the bill was prematurely filed. No useful purpose will be served in a discussion of the evidence bearing upon this issue. Suffice it to say that, after reviewing it, we are of the opinion that the findings of the trial court were sufficiently warranted by the evidence. They were in substance that, although such an extension was discussed between complainant and Beak in certain letters and telegrams, which passed between them, no binding agreement therefor, supported by a valuable consideration, was consummated.

As to counsels' contention regarding the general taxes assessed against the premises for the year 1920, we think that the evidence clearly shows that they were not paid by defendants, "as and when the same shall become due and payable" as provided in the trust deed, prior to the filing of the bill. This failure to pay such taxes, as well as the default of defendants in making payment of the principal sum due on the note maturing on January 1, 1921, justified complainant, under the terms of the trust deed, in electing to declare and declaring the entire indebtedness due and payable, as stated in the bill, without previous notice or declaration. (Holdroff v. Hemlee, 105 Ill. App. 671, 673; Heffron v. Gage, 149 Ill. 182, 190; Brown v. McKay, 151 Ill. 315,323.) In Caldwell v. Ellebrecht, 68 Ill. App. 596, 598, it is said:

Dorsey, 61 Md. App. 324, 325.) And, under the circumstances, the cause being brought by the parties as at issue, the filing of a replication by complainant must be held to have been waived. (Hoff v. Davis, 147 Ill. App. 463, 464, affirmed 241 Ill. 414, 420; Murphy v. Judd, 11 Ill. App. 69; Jones v. Lewis, 72 Ill. 149, 151.)

Counsel also contend that the evidence does not show an agreement, express or implied, between complainant and Neal, whereby commissions accrued the time of payment of the note, maturing on January 1, 1921, for the year, and that, therefore, the bill was prematurely filed. No verbal matters will be raised in a discussion of the evidence bearing upon this issue. Suffice it to say that, after investing it, we are of the opinion that the findings of the trial court were sufficiently supported by the evidence. They were in substance that, although such an extension was discussed between complainant and Neal in verbal letters and telegrams, which cause delays here, no binding agreement therefor, supported by a valuable consideration, was consummated.

As to counsel's contention concerning the general terms assessed against the premiums for the year 1920, we think that the evidence clearly shows that they were not paid by [illegible] "as and when the same shall become due and payable" as provided in the trust deed, prior to the filing of the bill. This failure to pay such taxes, as well as the matters of extraordinary in nature payment of the principal sum due on the note maturing on January 1, 1921, justified complainant, under the terms of the trust deed, in electing to declare and declaring the entire indebtedness due and payable, as stated in the bill, without previous notice or demand. (Hoffroff v. Jenkins, 150 Ill. App. 471, 472; Dalton v. Page, 147 Ill. 283, 290; Brown v. Dodge, 193 Ill. 322,328.) In Lathrell v. Hildebrandt, 68 Ill. App. 528, 529, it is said:

"We may take notice that under the laws of this State, taxes upon realty are due and payable on (or before) May first in each year." It is provided by statute (Chap. 120, Sec. 195, Cahill's Stat. 1921) that "all real estate upon which taxes remain due and unpaid on the tenth day of March, annually * * shall be deemed delinquent; and all such due and unpaid taxes shall bear interest after the first day of May at the rate of one per cent per month until paid or forfeited; parts or fractions of a month shall be reckoned as a month." In the present case it appears that said taxes were not paid until July 13, 1921, thirteen days after the bill was filed and after an application had been made by complainant for the appointment of a receiver of the premises, and that at the time of such payment a penalty of three per cent on the amount of the taxes had attached.

Counsel also contend that the fact of Beak's tender of an uncertified check to one of complainant's solicitors, two days before the bill was filed, for the amount then due on the note which matured on January 1,1921, together with the fact (as contended) that said tender was afterwards kept good, constitute a valid defense to a foreclosure. We cannot agree. The tender made on June 28, 1921, was not an absolute one but on condition that the note, uncancelled, be delivered up to Beak. The solicitor refused to accept the condition and thereupon Beak withdrew the tender. Furthermore, at this time it appears that the taxes due on the premises for the year 1920 had not been paid, and there was pending a claim for mechanics' lien against the premises amounting to $600 (which claim, after the bill was filed and to prevent the appointment of a receiver, Beak caused to be released), and that neither the amount of the unpaid taxes nor the amount of the lien claim was included in the tender. Furthermore, after the bill was filed and during the hearing before the master the tender was not sufficiently kept good by

the second tender of said check, even assuming that the uncertified check was a proper tender. The fees of complainant's solicitors, earned up to the time of said second tender were not included in the amount of the check, so as to make the tender an effective one. (Healy v. Protection Fire Ins. Co., 213 Ill. 99, 101; Fuller v. Brown, 167 Ill. 293, 295.)

And we do not think that under all the facts and circumstances in evidence the trial court erred in including in the amount of the decree the sum of $2,500 as reasonable fees for the services of complainant's solicitors.

Finding no reversible error in the record, the decree appealed from is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

(354/a)

5 - 28304

ALBERT KOTLINSKI,
Defendant in Error,

vs.

JOHN SCHULTZ and JUSTINA SCHULTZ,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

232 I.A. 625

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from the denial of a motion to vacate and set aside a judgment against defendants entered upon an ex parte hearing had in the absence of defendants and their attorney.

No rule of court touching the subject is before us, but the denial of such a motion ordinarily raises the question whether the court abused its discretion. The record shows that when the case was called for trial defendants' attorney was engaged in the trial of another case in the Superior Court, and sent a letter to the trial judge so advising him, which was delivered to the clerk and he informed the judge of its contents. On the hearing of the motion the judge so admitted but remarked, "my clerk is not running my court."

In this county where so many courts are in session at the same time, if, when a case is called, the attorney for one of the parties is actually engaged in another court it is generally recognized as good ground for passing the case until he is disengaged, unless there is a want of good faith, which is not made to appear in the instant case. We think, therefore, that under the circumstances the court's action was somewhat arbitrary and an abuse of discretion. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

ALBERT MOTTIN ET AL.
Defendant in error.

vs.

LYNN COUNTY and DUVALL COUNTY.
Plaintiffs in error.

CAUSE TO DISTRICT COURT OF LYNN COUNTY.

OPINION ON REHEARING.

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT.

This appeal is from the denial of a motion to vacate and set aside a judgment against defendants entered upon an ex parte hearing had in the absence of defendants and their attorney.

No rule of court involving the subject is before us, but the denial of such a motion ordinarily raises the question whether the court abused its discretion. The record shows that when the case was called for trial defendants' attorney was engaged in the trial of another case in the superior court, and sent a letter to the trial judge on adjoining lot, which was delivered to the clerk and he informed the judge of its contents. On the hearing of the motion the judge so admitted but remarked, "My court is not running my court."

In this county where so many courts are in session at the same time, if, when a case is called, the attorney for one of the parties is actually engaged in another court it is generally recognized as good ground for passing the case until he is disengaged, unless there is a want of good faith, which is not made to appear in the instant case. We think, therefore, that under the circumstances the court's action was unreasonable arbitrary and an abuse of discretion. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, C. J., and Kirby, J., concur.

12 - 28356

(3542a)

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

B. W. KORSAK,
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

232 I.A. 625

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted of an assault with a deadly weapon, to-wit, an automobile, with intent to inflict bodily injury. The only point relied on for reversal is that the court permitted prejudicial remarks by the prosecutor in the presence of the jury. As no motion for a new trial, if one was made, is preserved in the bill of exceptions, as is necessary to present the point made, it is not open for our consideration. This state of the record alone justifies an affirmance.

However, one of the remarks, namely, that defendant had been once convicted in the case and the verdict set aside, appears to have been addressed to the court before a jury was sworn to answer questions. If the remark could be deemed prejudicial it does not appear that it was made in the presence of any of the jurors accepted and sworn to try the issues.

The other remark was made in the course of argument to the jury to the effect that defendant kept a soft drink parlor and was running two large automobiles from saloon to saloon, and that the inference was that he was a "moonshiner." Whether the evidence justified such inference or its materiality was questioned would appear only from going to the record and reviewing the evidence which has not been abstracted or referred to. It is a familiar rule that when the record is not abstracted an appellate tribunal will not search the same to find grounds for reversal, and without such

a search we cannot say that the entire evidence would not show guilt beyond a reasonable doubt, in which case the remark, if prejudicial, would not be deemed ground for reversal.

The judgment will therefore be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

a method we should use that the higher minimum would not show built beyond a reasonable doubt, in which case the result, if predicted, would be in clear error for therefore.

The lawyer will hardly be satisfied.

LITERATURE.

Bailey, F. T., and Ellis, J. H. Evidence.

28550
274 - 28550

(3543a)

E. N. DUERLEIN, doing business as E. N. DUERLEIN & CO.,
Appellee,

vs.

ERNST A. TEICH, doing business as E. A. TEICH COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

232 I.A. 325

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The errors assigned in this case are based upon a directed verdict for the plaintiff, the defendant having rested at the close of plaintiff's case.

Plaintiff's statement of claim alleges that his claim is for commissions in negotiating a sub-lease for the Fifth avenue building, located at 101-3 South Wells street, between Max L. Teich, Ernst Teich and James E. Murphy, trustees, sub-lessors, and Pancoe Building Corporation, sub-lessee, and that a written agreement was entered into during the course of negotiations between him and defendant, which reads as follows:

> "In reference to the dealings for the sale of the Fifth Avenue Bldg., 101-103 South Wells street, to Sidney Morris Co., wish to say that if a deal should be consummated for the sale of the building, we will pay you as your share of the real estate commission, the sum of $3,500. As the deal involves such a small cash payment, and as all other payments are stretched out over such a long period, you will have to be satisfied with a smaller commission than you would receive if this were a cash deal. Kindly sign this letter as acceptance and return the same to us at your earliest convenience."

It further alleges the deal was consummated December 17, 1921, and that defendant has refused to pay the agreed commission or any part thereof. Other allegations in the

statement of claim of evidentiary facts are immaterial and need not be noticed.

The material part of defendant's affidavit of merits denies (1) that the plaintiff procured the "sub-lessee for the lease of said building;" (2) that Sidney Morris & Co., entered into a sub-lease for the same, and (3) that the deal was consummated at any time between the said Sidney Morris & Co., as such sub-lessee.

The contract is for a share of defendant's commission. He was in the real estate business and apparently closed the deal.

The plaintiff called him as a witness and he testified that he, Max L. Teich and James E. Murphy were trustees of the building referred to; that on September 1, 1921, he gave plaintiff a memorandum of the location and description of the building and terms of the 99 year lease, and a price for the building and leasehold interest. He admitted that plaintiff put him in touch with Sidney Morris & Co., composed of Morris Pancoe, Sidney Pancoe and Sam Pancoe, with whom he was negotiating on October 8, 1921, the date of said agreement; that negotiations were continued with the Pancoes until a deal was consummated in the form of a sub-lease to the Pancoe Building Co., organized by them, as may be inferred, a few days before it was closed; that it was the same transaction he had in mind at the time of the agreement; and that while a sale of the original leasehold was at first contemplated the negotiations culminated in a sub-lease as aforesaid. Defendant was then asked: "And as a result of that transaction, you owe Duerlein $3,500?" He answered: "Yes, sir."

The cross-examination of defendant did not change

statements of claim or evidentiary facts are immaterial and need not be noticed.

The real-life part of Jarndyce's difficulty of writing Dendal (1) that the plaintiff [illegible] the "sub-lease" for one lease of said building; (2) that Jarndyce Bowie & Co., entered into a sub-lease for the same, and (3) that the deal was consummated at any time before the said Jarndyce Bowie & Co., had made sub-lease.

The sentence in Jarndyce's defendant's complaint, he was in the real estate business and apparently alone, the deal.

The plaintiff argues the is a clause and he maintains that he, Jon a. Dalob and Jarndyce Bowie & Co., [illegible] building referred to [illegible] on September 1, 1921, he gave plaintiff a memorandum of the location and description of the building and terms of the [illegible] lease, and a copy of the building and landlord's [illegible]. He admitted that plaintiff by the in touch with Jarndyce Bowie & Co., [illegible] of Bowie [illegible] Jarndyce Bowie and Jarndyce, it was [illegible] on September 6, 1921. The [illegible] of said [illegible]; [illegible] were considered at the Bowie [illegible] and [illegible] in the form of a sub-lease to the [illegible] building [illegible] by them, [illegible] be inferred, [illegible] that it was the [illegible] the agreement; and that while a [illegible] of the [illegible] was at first contemplated the negotiations [illegible] lease [illegible] of that [illegible], and [illegible] "[illegible]" he answered: "Yes, sir."

The cross-examination of defendant did not change

this testimony. It merely brought out that the original negotiations contemplated a sale of the lease-hold for more money than was realized under the sub-lease. But the terms of the sub-lease were not involved nor proven.

Both parties rested upon this testimony.

The burden of appellant's argument is that the contract between him and plaintiff was a conditional one, and that the condition on which compensation was to be paid was not performed. In one part of his argument appellant contends that the condition was for the sale of the leasehold, and in another part, for a sale of the building. The written agreement does not refer to a leasehold, but does to the "sale of the building." However, defendant himself explained that the building could not be sold under the terms of the lease, that while the negotiations started with a proposition to sell the leasehold they changed to one for a sub-lease, and as closed the transaction was the same he had in mind when he signed the agreement, for which, he admitted, he owed plaintiff the amount of compensation the agreement called for.

These admissions seemingly ought to be conclusive of defendant's liability, unless the judgment cannot stand on the pleadings and evidence. As explained there is no variance between the contract sued upon or the statement of claim, and the proof; and if the explanation so made were not admissible under the doctrine stated in Gage v. Cameron, 212 Ill. 146, 163, to explain the intention of the parties, yet there was no objection to such testimony, and no point was made that there was a variance. In fact, defendant's testimony fairly interpreted is that the agreement contemplated such a deal as was actually consummated.

this testimony. It merely results, not that the original [illegible] participated a [illegible] of the [illegible] for more money than was required under the sub-lease. But the terms of the sub-lease were not introduced as evidence.

Both parties waived some oral testimony.

The burden of establishing estoppel is upon the tenant between him and plaintiff [illegible] and that the conditions in which [illegible] was to be held and not distributed. In the face of his argument conditions remained such the conditions was for the sole of the [illegible], and in [illegible] part, the sale of the building. The written agreement does not refer to a [illegible], but deals in the terms of the building." However, defendant [illegible] contended that the building would not be sold under the terms of the lease, but that the [illegible] agreed with a proposition to sell the [illegible] may changed to one for a sub-lease, and it [illegible] the transaction was to be sold it might when be signed the agreement, the which, he [illegible], he [illegible] plaintiff the [illegible] of [illegible] the agreement [illegible] for.

There [illegible] strongly [illegible] to the [illegible] of defendant's liability, [illegible] the [illegible] based on the pleadings and evidence. [illegible] is to be [illegible] between the [illegible] based upon [illegible] or [illegible], and the [illegible]; and if the [illegible] as [illegible] for [illegible] under the [illegible] [illegible] [illegible], [illegible], [illegible], to [illegible] the [illegible] of the [illegible], yet [illegible] we [illegible] in such [illegible], and [illegible] such that there was a [illegible]. In fact, defendant's [illegible] [illegible] is that the [illegible] [illegible] with a [illegible] or [illegible] [illegible].

The only material issues defendant attempted to raise by his affidavit of merits were that plaintiff was not the procuring cause of the deal, and that it was not consummated with Sidney Morris & Co. But such defenses are not responsive to the statement of claim, and as pleaded are highly technical. They are that plaintiff did not procure the "sub-lessor" (presumably meaning sub-lessee) "for said building," and that said Sidney Morris & Co., did not enter into a sub-lease "for said building" and was not the sub-lessee with whom the deal was closed. If they were merely intended to raise the technical question whether the agreement was for the "sale of the building", they are answered by defendant's own testimony to the effect that the sale of the building alone was never contemplated and could not under the terms of the lease be made. As to the defense that plaintiff was not the procuring cause, defendant admitted he was, and that the deal was made with the Fancoes whom plaintiff brought to him and who assumed the name of Sidney Morris & Co., until negotiations were closed by them in the name of Fancoe Building Corporation. Not only is the agreement not conditioned upon a sale to Sidney Morris & Co., but the statement of claim does not rely upon a deal with them by that name. It is clear that the negotiations from beginning to end were with the same persons, and that while the agreement is somewhat indefinite it evidently contemplated that plaintiff would be compensated as therein stated for any deal said trustees saw fit to close with the parties he had brought to them, whether under one name or another.

We think, too, that defendant's accepted written proposition bears internal evidence that a change from the

The only material issue defendant attempted to raise by his affidavit of merits was that plaintiff was not the rightful owner of the deal, and that it was not authorized with Sidney Morris & Co. This issue defendant did not raise in the statement of claim, and he pleaded its bailor wrongful. They say that plaintiff did not produce the "non-lessor" (somebody meaning non-lessor) "for said bailing," and that said Sidney Morris & Co., did not enter into a "non-lease for said bailing" and was not the non-lessee with whom the deal was closed. If they were merely interested in using the technical objection whether the agreement was for the "sale of the bailing", they are answered by defendant's own contention in the effect that the sale of the building alone was never contemplated and could not under the terms of the lease be made. As to the defendant that plaintiff was not the proper party, defendant modified he was, and that the deal was made with the Toronto room plaintiff brought to him and who assumed the name of Sidney Morris & Co., until negotiations were closed by them in the name of Jerome Building Corporation. Not only is the agreement not conditioned upon a sale to Sidney Morris & Co., but the statement of claim does not rely upon a deal with them by that name. It is clear that the negotiations from beginning to end were with the same person, and that while the appellants in somewhat indefinite fashion contemplated that plaintiff would be incorporated as Sidney Morris for any deal, the business was fix to close with the parties he had dealt to them, whether under one name or another.

We think, too, that defendant's adopted written proposition being internal evidence that a change from the

original deal had already taken place when it was made, and the oral evidence is to the effect that the charge was for such a deal as was consummated. The evidence being undisputed and sufficient to sustain the statement of claim there was no error in directing the verdict.

Accordingly the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

original deed had already taken place when it was made, the
the real intention is to be ascertained from the deed and the
such a fact is not communicated. The circumstances relied upon
are sufficient to sustain the statement of claim there was no
error in directing the verdict.

Accordingly the judgment is affirmed.

Affirmed.

Bradley, J., dissenting, Ch. J., concurs.

17 - 28633

3544a

HAROLD A. HOWARD and JOHN C. HOWARD, trustees, under the last will and testament of SARAH J. HOWARD, deceased, Defendants in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
EUGENE F. KANNS, Plaintiff in Error.	

232 I.A. 25

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ brings for review a judgment for possession in forcible detainer, and for $1295.73 rent. After a judgment by default had been vacated defendant entered a special appearance by his attorney, appeared at the trial, and introduced evidence. His contention, therefore, that he was not properly before the court because not served with summons is untenable. By appearing and taking part in the trial he waived service of summons and submitted himself to the jurisdiction of the court.

Equally untenable is the contention that the court erred in not receiving evidence as to defendant's custom in paying the rent at times other than the times provided for in the lease. It did not tend to show that the terms of the lease had been modified or waived.

Defendant's third contention is that he was not in possession of the premises at the time of the judgment because after service of the five days notice upon him, and about the time the suit was begun, the secretary of one of the plaintiffs advised the subtenants under defendant not to pay him rent while the proceedings were pending. Even if the secretary was authorized to give such advice, yet there could be no constructive eviction without a surrender of possession.

(Barrett v. Boddie, 158 Ill. 479, 484; Keating v. Springer, 146 Ill. 481, 496.) And even if the advice constituted such an interference with his right as would justify surrender of possession, yet not having surrendered possession of the premises he will be deemed to have waived any right to abandon them. (Keating v. Springer, supra, p. 496.) None of defendant's contentions, therefore, is tenable.

Defendants in error have moved to dismiss the writ on the ground that the only mode of review given by the forcible entry and detainer statute is by appeal, and that the right to review by a writ of error does not apply to purely statutory proceedings unless especially given by the legislature. However, there may be a writ of error to review a money judgment, which is included in the judgment in this case. The motion, therefore, will be denied.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

(Barrett v. Denver, 168 III. 630, 648; Bradley v. Atlantic, 146 III. 271, 292.) And even if the above conclusions were as intelligences with his right to which jurisdiction terminator of passenger, yet not during unauthorized possession of the premises he did. He doubt he have notice was right to abandon them. (Bradley v. Atlantic, supra, p. 292.) Some of defendant's contentions, therefore, be towards.

Defendants in error have moved to dismiss the writ on the ground that the only mode of review given by the revision entry and decision should be by appeal, and that it ought to review by a writ of error and not right to merely statutory proceedings under supplied given by the legislature. However, there may be a well of error be either a moral judgment, which is contained in the judgment in this case. The motion, therefore, will be denied.

CONCLUSION.

Gridley, P. J., and Kirkpatrick, J., concur.

53 - 28701

(3545a)

WILLIAM V. HOIER, doing business as William V. Hoier Company, Appellant, vs. HARRY KAPLAN and HELEN KAPLAN, his wife, ANE SACHS and BESSIE SACHS, his wife, and SALOMON BIN and SLATE BIN, his wife, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

2321.A 626

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

To a reamended petition by a contractor for a mechanic's lien for the installation of a heating and ventilating plant placed in defendants' building, and for extra work and materials for a bath-house erected on the premises, defendants filed a general and special demurrer challenging the claim for labor to the amount of $4,551 for furnishing heat while the building was under construction, and for the items, $3.68 and $71.91 for workmen's compensation insurance, 65 cents and $12.74 for public liability insurance, and $127.50, one-half of the cost of a surety bond.

The general demurrer was overruled, and the special demurrer as to said labor and enumerated items was sustained; and complainant having elected to stand by his petition, it was dismissed so far as it included such labor and items, and defendants were ruled to answer the remaining portions of the petition.

From such order of dismissal this appeal was taken, and appellees have moved to dismiss it on the ground it is not an appeal from a final order, and contend that such labor and items were not the subject matter of a mechanic's lien under our statute.

In answer to the motion to dismiss this appeal

No. - 6701

WILLIAM V. MOLLA, Acting
Business as WILLIAM V. MOLLA
Company,

Appellant,

vs.

BANDY KAMILAR and BANDY KAMILAR,
his wife, d/b/a Queen and Queen
BAKING, his wife, and WARREN
ST and Marie St, his wife,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Mr. JUSTICE DUNNE DELIVERED THE OPINION OF THE COURT.

This a rescinded petition by a contractor for a mechanic's lien for the installation of a heating and ventilating plant, filed in defendants' building, and for extra work and materials for a bath-house erected on the premises. Defendants filed a general and special demurrer challenging the right for lacer to the amount of $4,321 for installation and claim for materials and contracting, and for the items, $1.25 and $71.75 for workmen's compensation insurance, $2 costs and $12.75 for public liability insurance, and $127.50, one-half of the cost of a hardy heat.

The general demurrer was overruled, and the special demurrer as to said labor and materials items was sustained; and complainant having elected to stand by his pleading, it was dismissed as for so it included such labor and items, and defendants were ruled to answer the remaining portions of the pleading.

From such order of dismissal this appeal was taken.

and appellees here moved to dismiss it on the ground it is not an appeal from a final order, and contend that such labor and items were not the subject matter of a mechanic's lien under our statute.

In answer to the motion to dismiss this appeal

appellant invokes the principle that where a decree is severable - that is, composed of distinct parts having no bearing on each other - each part may be treated as a distinct decree, and an appeal taken from one part without affecting the other, citing Walker v. Pritchard, 121 Ill. 221; Oliver v. Wilhite, 201 Ill. 552; Mussey v. Shaw, 274 Ill. 351, and other cases. Most of the cases cited are those where an appeal was taken from one part of a final decree which settled the controversy between the parties in all respects, or where cross errors were not allowed to a part of the decree not appealed from, or where an appeal was taken from a single item in an administrator's account. Such cases are hardly in point. But while none of the other cases cited is strictly analogous the reasoning in some of them brings the case within the principle involved. In Mussey v. Shaw, supra, the complainant appealed from that part of a decree holding the legal title to premises was in the defendant subject to a trust for the life of complainant, and the defendant appealed from another part of the decree limiting her to certain credits with respect to which there was a direction to the master to state an accounting. While it was held that the appeal by defendant was interlocutory and was dismissed, the court entertained and affirmed that part of the decree appealed from by complainant and remanded the cause for further proceedings, saying that:

> "Where there are independent matters disposed of by a decree an appeal may be taken from that part dealing with a particular subject, and such an appeal operates as a severance in the trial court from parties and questions not concerned in the appeal. (359)

In Blake v. Blake, 80 Ill. 523, the court held an appeal from awarding attorneys' fees to the wife to enable her to defend an appeal by the husband from a previous order in the case committing him for contempt for non-compliance with another order

complaint invokes the principle that where a court is overturning - that is, reversal or decision - it must be working on each other - each part may be [illegible] a [illegible] drawn, and an appeal taken from any [illegible] affecting the other. Citing Baker v. Trafchuk, 121 111. App. [illegible]; Jones v. Fagan, 247 111. 282; Bauer v. Jones, 274 111. 5[illegible], and other cases. Most of the cases cited are those where an appeal was taken from one part of a final decree which affect the contractual relation the parties in all respects, or in [illegible] were not allowed to a part of the decree [illegible] from, or where an appeal was taken from a single [illegible] in an administrator's account. Such cases are hardly in point. The [illegible] of the right cases cited is entirely analogous the [illegible] in case of this [illegible] the case within the principle involved. In Bauer v. Jones, supra, the complainant appealed from that part of a decree holding the legal title to premises was in the defendant subject to a trust for the life of complainant, and the defendant appealed from another part of the decree finding that a trustee [illegible] with respect to which there was a direction to the master to state an accounting. While it was held that the appeal by defendant was premature and was dismissed, the court individual and efficient [illegible] of the decree appealed from by complainant and remanded the cause for further proceedings, saying that:

> "where there are independent matters disposed of by a decree an appeal may be taken from that part dealing with a particular subject, and such an appeal operates as a severance in the final order from partial and questions not concerned in the appeal." (282)

In Fagan v. Fagan, 80 111. 80, the court held as follows: from awarding alimony fees to the wife to enable her to defend an appeal by the husband from a previous order in the case constituting him for contempt for non-compliance with another order

therein, was an appeal from a final order, and said it was no answer that the order might be reviewed on a final decree against him. This and other cases point out the unnecessary expense and hardship that might ensue from denying the appeal until after a final decree. The test is whether the decree or order appealed from determines the ultimate rights of the parties with respect to distinct matters which have no bearing or influence on the matters left for further consideration. Here the order of dismissal effectually disposes of a definite and separate branch of the controversy and, therefore, was final and appealable. (Chicago Railways Co. v. City of Chicago, 292 Ill. 190.) The motion to dismiss the appeal will, therefore, be denied.

But we think the petition was properly dismissed as to the insurance items and the one-half cost of the bond. The theory of the petition as to them is that the contractor took them into consideration in fixing the contract price. These costs did not constitute labor by computing them as part of the wages therefor, nor become chargeable as such, or as material furnished merely by estimating them as a part of the contract price. Nor did the provision of the contract that the owner would pay one-half of the cost of the surety bond make it a lienable item. The lien is not created by contract but by statute. (Rittenhouse & Embree Co. v. Warren Construction Co., 264 Ill. 619.) We find nothing in the mechanic's lien act that brings such items within its provisions.

Nor do we think there was a lien for labor in furnishing the temporary heat even though upon the order of the architect, and even though the petition alleges it was necessary for the construction of said building during the winter months it was in process of erection, "in order to furnish atmosphere in which the workmen would work and to preserve the interior construction from

thereto, but on appeal from a final order, not until it was so. Where that the order might be reviewed on a final decree against him. This and other cases point out the unnecessary expense and hardship that might ensue from denying the general right to a final decree. The best is perhaps the decree of Every appealed from determines the ultimate rights of the parties with respect to relations matters which may be treated as independent on the merits but for different considerations. Here the order of dismissal effectually disposes of a liability and accounts because of the controversy and, therefore, was final and appealable. (Bloomer Multiplex Co. v. Star of Service, 7th Cir. 1920.) The motion to dismiss the appeal will, therefore, be denied.

Let us turn the petition for prerogative mandamus to the interrelate issue and the one-half million dollar bond. The theory of the petitioner is to view in that the contractor and then into consideration in fixing the contract price. These cases did not construction taken by respondent than in part of the wages therefor, nor because unreasonable in work, or by intentional withholding merely by waiting time as a part of the contract price. But did the provision of the contract that the owner would not pay half of the cost of the merely road work is a likewise item. The item is not created by contract but by statute. (Bloomer Multiplex Co. v. Durham Construction Co., 3rd Cir. 1917.) We find nothing in the contractor's letter that the bidder work items without its provisions.

Nor is we think there was a lien for items in connection the temporary road even though when the order of the contractor, and even though the petitioner alleges it was necessary for the construction of said building during the winter months in the process of erection. Moreover to require assessment in order the workmen would work and to preserve the interior connection from

damages by frost" - the concrete floors from cracking and the plastering from falling off and cracking. Necessity or whether the workmen would work without such heat is not the test. The question is whether under the rule of strict construction of the act, which we are required to observe, (Cronin v. Tatge, 281 Ill. 336; Rittenhouse & Embree Co. v. Brown, 254 Ill. 549,) the labor connected with furnishing such heat is labor performed in the building of the structure.

We recognize the question is a new one in this jurisdiction. Appellees rely mainly on the rule as applied in the Brown case, supra, where it was held that material which went into forms into which concrete was poured did not come within the provisions of the statute, the material not having become a part of the completed structure. Appellant urges that because the forms were for temporary use and taken away by the contractor and regarded by the court like tackle, implements, tools and apparatus, as a means employed in the process of erection for which no lien is given, the case is readily distinguishable from cases cited from other jurisdictions allowing a lien where material, though employed as such means, was consumed in the process of construction, and upon that theory was held to have entered into the construction.

Cases are cited where on such theory a lien was allowed for coal furnished in heating and drying a building (Crowell Lumber & Grain Co. v. Ryan Co., 193 N.W.Rep. 609 (Neb.),); for gunpowder used in preparing ground for use in an aqueduct, the court saying, "in a general sense" it entered into the building structure (Sampson Co. v. Commonwealth, 202 Mass. 326) and explosives for blasting in preparing the ground for final structure (Schaghticoke Powder Co. v. Railroad Co., 183 N. Y. 306; Hercules Powder Co. v. Railroad Co., 113 Tenn. 582; Repauno Chem Co. v. Rd. Co.,

damage to street - the contractor's duty to protect the public and to protect from falling off the roadway. Negligence or another who carries on his business in such a way as not to injure others. The question in doubtful cases is one of fact, of which considerations of the act, which is the material to determine, Cooley v. Tolles, 90 Ill. 456; Illinois & Michigan Can. v. Blake, 94 Ill. 197; the labor connected with demolishing such work is later performed in the building of the structure.

The proposition the contention is by no means to this jurisdiction. Questions only similar to the one in question in the Brown case, supra, where it was held that contracts which had into force into which concrete was poured to not was within the provisions of the statute, the material not having become a part of the contemplated structure. Question also arose the time for beginning action under law by the municipality and required by the lower life system, holding that, while not apparently, as a whole, employed in the production of the action for which an lien is given, yet cons is equally inseparable from equipment other from construction although a line where material, though employed in such manner, was essential to the success of construction, not upon that theory was held to have entered into the construction.

Cases are cited where on some theory a lien has been allowed for most furnished in erecting and repairing a building (Central Lumber & Grain Co. v. Lane Co., 149 S.W.Rep. 808 (Ark.)); the power-air used in carrying grades therein to be equipment, the court said, "in a general sense" it helped into the building structure (Jackson Co. v. Construction, 87 Kan. 837 and explanation for statutes to construe the general for final structure (Lumber-Grain Co. v. Building Co., 149 S.W. 808; Lumber Co. v. Building Co., 149 Kan. 837; Lumber Co. v. Co.,

59 Mo. App. 6); for lumber used in constructing a cofferdam, and for shoring, so far as consumed and rendered worthless (Barker & Stewart Lumber Co. v. Marathon P. M. Co., 146 Wis. 12; Moritz v. Sands Lumber Co., 158 Wis. 49); for electricity used in illuminating a mine to enable the laborers to work therein. (Grants Pass Trust Co. v. Enterprise Mining Co., 58 Ore. 174.)

It may be that it would not strain the doctrine to hold that heat used to give proper consistency and temperature to plaster and concrete would be material consumed in the process of construction and, "in a general sense" as said in the Massachusetts case, would enter into it, and that, therefore, labor in furnishing it would be lienable. While as said in the Brown case, supra, the language in mechanic's lien statutes in other states is so variant that decisions on them are of little assistance, yet it would seem as if the court in such cases was not governed, as are the courts in this state, by the rule of strict construction which is adhered to even though section 39 of the Mechanic's Lien Act provides "this act is and shall be liberally construed as a remedial act." (North Side Sash & Door Co. v. Hecht, 295 Ill. 515.)

It was said in Provost v. Shirk, 223 Ill. 468, 473, that the lien should not be extended to cases not provided for by the language of the statute, even though they fall within its reasoning.

After the decision in the Brown case, supra, our statute was amended so as to render lienable "forms or form work used in the process of construction where concrete, cement or like material is used." (See secs. 1 and 7 as amended by the act of 1913.) It was said in the Brown case, that the words "used in such building or improvement," and "used in construction," - which are still retained as to materials, etc., for which a lien is given - mean more than "employed in the process of construction as a means for assisting in the erection of the building." While substantially the quoted language of the court is used in the act as amended, the words

90 So. 2d). For broker used in constructing a mechanism, and for storage, so far as material was concerned, exempt (Lyons & Stewart Lumber Co. v. Lyons & L. Co., 142 Ga. 12; Lewis v. Hogan Lumber Co., 142 Ga. 9); for electricity so used in illuminating a mine to enable the laborers to work therein. (Cobbs Lake Coal Co. v. Interstate Mining Co., 80 Ga. 124.)

It may be that it could not matter the testimony is held that best work to give proper consistency and homogeneity to plaster and concrete would be material consumed in the process of construction and, "in a general sense" as said in the "construction case, would under this it, not that, therefore, there is tangible it would be taxable. Only as said in the Lyons case, Supra, the language in McDonald's line statutes in other states in no related that decisions on them are of little assistance, yet it would seem as if the court in such cases not all process, in the courts in this state, by the rule of strict construction and it should be given though section 92 of the McDonald's line act provides that act is and shall be liberally construed as a remedial act." (Jones Mills Lumber Co. v. Hogg, 90 Ga. 121, 122.)

It was held in Crowder v. Mills, 90 Ga. 122, 92, that the line should not be extended to cases not provided for by the language of the statute, even though they fall within its reasoning.

After the decision in the Lyons case, Supra, our statute was amended so as to read: "Machinery in the form of fixtures which are used in the process of construction shall constitute, upon it after material is used." (Law 1908, 1 and 2 as amended by the act of 1913.) It was said in the Tucker case, that the words "used in such building or improvement," and "used in construction," - which are still retained as to machinery, etc., for which a line is given - mean that "employed in the process of construction or a means for erecting in the creation of the building." While mechanically the general language of the court is used in the act as amended, the words

"used in the process of construction," were not in the act before the amendment and are now specifically limited to "forms or form work where concrete, etc." These words do not enlarge the act to cover any other means employed in the process of construction. The amendment is one of several instances where the statute has been amended to include what by strict construction had previously been held not within its purview.

We are cited to no case where the furnishing of heat for the comfort of the workmen or to insure a better job of plastering or cement work has been regarded as material entering into the structure, or where labor in furnishing such heat has been deemed labor performed in building the structure, and we find no language in our statute from which such an extension of meaning is justified. It has been frequently held in this state that the mechanics' lien law is in derogation of the common law and its provisions must be strictly construed, and that nothing will be inferred in favor of one claiming a lien. (North Side Sash & Door Co. v. Hecht, 295 Ill. 515, and cases there cited.)

We think it is inferable from the Brown case that our statute evidently makes a distinction between material delivered for the purpose of being used in construction and that used merely as a means in the process of construction, except as changed to include "forms," etc., as above referred to.

Observing the rule of strict construction, therefore, we think it cannot be said that the labor in furnishing temporary heat as aforesaid, even if beneficial in the respects claimed, comes within any provision of our statute.

Accordingly the order of dismissal will be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

"used in the process of production," were not in the not before the enactment of the new specifically limited to "tools or farm work shop outcrops, etc." These words do not enlarge the act to cover any other means employed in the process of manufacture. The statement is one of material importance since the activity has been confined to trades dealt by strict construction and previously been held not within the purview.

It was claim is no more than the terminating at least for the convenience of the workmen or to insure a better job of plastering or cement work and been regarded as material entering into the structure, or where labor in fabricating work has been deemed labor performed in building the structure, and is held as damages in not relate from which such as extension of machine in installing. It was then formally said in case where such the mechanical lien law is in derogation of the common law the provisions must be strictly construed, and that nothing will be interpreted in favor of one claimant a lien. (Wirth Ice Mach. & Ref. Co. v. Hecht, 167 Ill. 319, and many other cases.)

We think it is inferrable from the Mechan case that our statute evidently makes a distinction between material furnished for the purpose of being used in manufacturing and that used merely as a means in the process of manufacture, except as changed to include "items," etc., as above referred to.

Observing the rule of strict construction, however, we think it cannot be said that the lower is furnishing machinery that is otherwise, even if manufactured in the company claimed, where within any provision of our statute.

Accordingly the order of dismissed will be affirmed.

Affirmed.

Brady, P. J., and Gibson, J., concur.

(3546a)

28711

ROBERT SIMPSON et al., etc., Appellees,	INTERLOCUTORY
vs.	APPEAL FROM
	CIRCUIT COURT,
MAY ELLEN SIMPSON ANDERSON et al., Appellants.	COOK COUNTY.

232 I.A. 626

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an interlocutory order appointing a receiver for certain properties, real and personal, and of the income therefrom, in which appellees, in their bill and supplemental bill of complaint, claim an interest as devisees and legatees under the last will and testament of Robert Simpson, deceased.

The bill, with the amendment and supplement thereto, asks for the construction of said will, an accounting for alleged fraudulent conversion of income under it, for discovery and appointment of a receiver, and for general relief.

In the view we take of the case it will be unnecessary to set out the contents of the bill and supplement, or to discuss at length the various points made on this appeal.

From these pleadings it appears that Robert Simpson died in 1914, and left surviving him, as his only heirs, two sons, Robert W. and Charles, and five daughters, four of whom are the appellants in this case, and for brevity may be referred to by their given names, May, Florence, Margaret and Eureka. The fifth daughter, Charlotte P. S. Fluery, will be referred to as Mrs. Fleury.

Notice of the application for this order was served

[illegible]

JOHNS HOPKINS et al., etc.,
Appellants,

vs.

RAY MALIN HARRIS BURNES et al.,
Appellees.

In the Circuit Court
of
Baltimore County.

No. 10,[illegible]

This appeal is from an interlocutory order overruling a receiver for certain properties, real and personal, and of the in-rem jurisdiction, in which appellees, in their bill and supplemental bill of complaint, claim an interest as devisees and legatees under the last will and testament of Henry Clapper, deceased.

The bill, with the amendment and supplement thereto, asks for the construction of said will, an accounting for alleged fraudulent conversion of income under it, for injunction, and appointment of a receiver, and for general relief.

In the view we take of the case it will be unnecessary to set out the contents of the bill and supplement, or to discuss at length the various points made on this appeal.

The three plaintiffs it appears that Henry Clapper died in 1914, and left surviving him, as his only heirs, his sons, Robert C. and Charles, and five daughters, four of whom are the appellees in this case, and for convenience may be referred to by their given names, Mrs. Clapper, Burnes and Harris. The fifth daughter, Charlotte F. C. Clapper, will be referred to as Mrs. Clapper.

Notice of the application for this order was served

on each of the daughters except Eureka, who was not found and who it clearly appears from the record has no interest in any of the property over which the receiver is appointed, and for that reason is in no position to complain of the order as she cannot be prejudiced thereby.

Margaret was defaulted and a decree pro confesso entered against her prior to the entry of the order appealed from. A general appearance for the other three daughters was entered by their solicitors, but on the hearing of the motion for the receivership they announced "in this receivership we appear only for Mrs. Floury," thus impliedly waiving objections to the application as to the others for whom they appear generally, unless, as contended, they may nevertheless question the sufficiency of the bill to justify the order. "It is a settled rule that a defendant to a bill in chancery, where a default and decree pro confesso have been entered, may, on error, contest the sufficiency of the bill itself, or that its averments do not justify the decree." (Monarch Brg. Co. v. Wolford, 179 Ill. 252, 255.) While appellees contend that this rule does not apply to an appeal from an interlocutory order, we do not think the distinction is obvious, but shall, except as necessary, refrain from discussing questions involving the merits of the bill.

Appellants' first point that due notice was not given to all of the defendants applies only to appellant Eureka, who, as above stated, is, for want of interest in the property over which the receiver was appointed, in no position to be heard.

The second point is that appellees have a complete and adequate remedy at law. The bill and supplement thereto seek a construction of the will, urging grounds therefor which we will not discuss. But it is alleged that appellants have collected and converted to their own use the income from certain properties

on pain of the penalties [illegible]. The son was [illegible] and
who is already [illegible] [illegible] in [illegible] of
the property over which [illegible] [illegible], and for that
reason is in no position to complain of the [illegible] as [illegible]
be predicated thereby.

[illegible] Interpreted was defendant and a [illegible] [illegible] [illegible]
against her prior to the entry of the [illegible] [illegible].
general assurance for the other [illegible] was [illegible] by
their coli-tiers, but on the hearing of the motion for the re-
covering they [illegible] "it will [illegible], we [illegible] [illegible]
Pro. Tiffany." then [illegible] [illegible] [illegible] [illegible]
as to the [illegible] [illegible] [illegible] [illegible], [illegible], [illegible]
tended, they may [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
to justify the order. "It is a [illegible] [illegible] [illegible] [illegible]
a will in [illegible], where a [illegible] [illegible] [illegible] [illegible]
been [illegible], may, on [illegible], [illegible] [illegible] [illegible] [illegible]
itself, or that it [illegible] [illegible] [illegible] [illegible] [illegible]." [illegible]
[illegible] Co. v. [illegible], 172 [illegible], [illegible] [illegible] [illegible]
that this rule does not apply to [illegible] [illegible] [illegible] [illegible]
[illegible], we do not think the [illegible] is [illegible], [illegible] [illegible],
[illegible] to [illegible], [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] of the will.

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
to all of the [illegible] [illegible] [illegible] [illegible] [illegible], [illegible], [illegible]
above [illegible], is, for [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible]
the [illegible] [illegible] [illegible], [illegible] [illegible] [illegible] [illegible] [illegible].

The [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]. The [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] of the will, [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible]. But it is alleged that [illegible] have [illegible]
and [illegible] to [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

which the will purports to give to appellees for which an accounting is asked; that said May and said Florence, together with one of their deceased brothers and another party who has renounced the right to act as executor, were named as executors of said will, and that although it has been admitted to probate by order of the Circuit Court no executor or any trustee has been appointed by any court; that appellants have either disposed of or taken adverse possession of certain properties in which under the will appellees are alleged to have an interest; that they are irresponsible and unable to recompense appellees for the property so received by them; that appellees fear they will suffer irreparable loss unless a receiver is appointed of the income from said property and to take possession of the real estate and personal property in which they are alleged to have an interest.

These avernments are sufficient to show a case for equitable jurisdiction regardless of the broadened jurisdiction to construe a will given by the amendment to section 50 of the Chancery Act of 1911. (McCarty v. McCarty, 275 Ill. 573.)

And we think the bill sets forth circumstances and facts justifying the appointment of a receiver. The complainants in this case are minors. The executors named in the will are required to perform duties in the nature of a trust in favor of these complainants, upon which the testator devised some of his property, and they not only have not qualified as such but it is alleged that they have made a division of the property as intestate property, disregarding their trusteeship and the rights of appellees. It is said in High on Receivers, 4th Ed. 569:

> "And upon a bill by children of a testator to establish his will, and to enforce the performance of certain trusts in favor of plaintiffs upon which the testator devised his property, and for an account of rents and profits, a receiver has been allowed of

upon the will proceeds to give to specified persons, in accordance with a plan; that such gift and such persons, in either all or one of their personal interests and another party who has contested the rights to not as executors, were named as executors of said will, and that although it has been sought to produce by motion of the Probate Court on behalf of any trustee has been instituted in our court; that appellees have either disposed of or taken adverse possession of certain properties in which under the will appellees are alleged to have an interest; that they are irresponsible and unable to recompense appellees for the property so received by them; this application &c. they will suffer irreparable loss unless a restraint is granted of the income from said property and to make accounting of the real estate and personal property in which they are alleged to have an interest.

These averments are sufficient to show a case for equitable jurisdiction regardless of the broadened jurisdiction to construe a will given by the amendment to section 10 of the Judicary act of 1911. (Lowery v. Erlewein, 270 Ill. 275.)

And we think the bill sets forth circumstances and facts justifying the application of a receiver. The complainants in this case are minors. The executors named in the will are required to perform duties in the nature of a trust in favor of these complainants, upon which the testator devised some of his property, and they not only have not qualified as such but it is alleged that they have made a division of the property or indicate property, disregarding their statements as to the rights of appellees. It is said in Kirk on Receivers, 2d Ed. 5:

"And upon a bill by children of a testator to establish his will, and to enforce the performance of certain trusts in favor of plaintiffs upon which the testator devised his property, and for an account of rents and profits, a receiver has been allowed on

> the rents and profits, when it was manifest that the testator's intentions had been disregarded."

On this theory and the alleged facts the appointment of a receiver was justified; and as the order appoints a receiver to take possession of, and collect the rents and income from only such real and personal property, in which the complainants claim an interest as was in the possession of the appellants herein and Mrs. Fluery, or any of them, at the time this suit was instituted, and as Mrs. Fluery has not appealed and Eureka has no interest in the properties and the other three appellants stand in the position of having waived objections to the receivership, none is in a position to complain of the order, except on the ground, possibly, that the bill is insufficient to justify it, which we have already considered.

While courts of equity advance with extreme caution in granting receivers as against a defendant in possession, yet the court is justified in so doing when it is made to appear that there is great risk of ultimate loss to the property, and insolvency on the part of defendant, so that he will be unable to respond to a final decree. (High on Receivers, 4th ed., sec. 557.) Where such a state of facts exists we do not think the court should refuse to act, as contended by appellants, simply because the will has been admitted to probate, especially when no steps have been taken to preserve the res.

Appellants contend that under the most favorable construction of the will appellees have no present right to any of the income over which the receiver was appointed. Clause 7 of the will devises a farm, with other property, after the death of the testator's last surviving son, to the body heirs of his said two sons "to be their sole property to be owned, managed and controlled by them after the youngest of said heirs shall have attained the age of 21 years." Appellants contend that this clause postpones any interest or income [illegible]

the lands and property, when it was apparent that the testator's intentions had been disregarded.?

In this theory are the sixteen Fifth Ward residents of a receiver was justified; and in the other equitable a receiver to take possession of, and collect the rents and income from duly elected and personal property, in which the equitably claims an interest as one in the possession of the applicants herein and here. Thereby, in any of them, at the time this suit was instituted, and so then. Thereby has not dispelled and therefore has an interest in the properties and for that there appropriate stand in the position of having relinquished rights to the revolverdly, none to be a position to consider of the order, always on the ground, necessary, that the will is insufficient to justify it, which we have already mentioned.

While courts of equity involve with between parties in effecting procedure or against a defendant in possession, yet the court is justified in so doing when it is made to appear that there is great risk of irreparable loss to the property, and insolvency on the part of defendant, so that he will be unable to respond in a final decree. (Ohio ex Overmyer, 4th Ed., 887.) There must a risk of irreparable attack by an are value the court should refuse to act, or restricted by equitable, simply because the will had been admitted to probate, only slight no steps have been taken to preserve the res.

Appellants contend that under the most favorable construction of the will appellees have no present right to any of the income over which the receiver was appointed. Clause 7 of the will devises a fund, with other property, after the death of the testatrix into everything own, to the duly heirs of her said two sons "to be their sole property in fee". Immediate and contingent by time after the remainder of full which shall have obtained the age of 21 years." Appellants contend that this

the youngest of said children, assuming them to be "body heirs" of Robert W., becomes of age. Without attempting to discuss other provisions of the will which when taken in connection with the quoted provision favor a different construction thereof, it is enough to say for the disposition of this appeal that we do not concur in that contention.

It is also argued that appellees are not the "body heirs" of Robert W. Simpson. That is a question of fact raised upon an affidavit of Mrs. Fluery, charging the illegitimacy of appellees. She alone raises it and has not appealed. Appellants are in no position to be heard except upon the sufficiency of the bill itself, and therefore cannot question its allegations that appellees are body heirs of Robert W. Simpson and that there is property and income accruing and accrued therefrom to which they are entitled under the will. We think under the facts and circumstances set forth the receiver was properly appointed to conserve their interests pending thefinal determination of the suit.

Nor do we agree with or need discuss appellants' contention that certain portions of the will are void for uncertainty.

Accordingly the order of appointment will be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

the vanquest of such outcrops, perhaps that be "holy alone" of Robert L., Bishop of Ely. Without elaborating on Gibson other provisions of the will which have been in consecution with the quoted provision (hence a different construction than-of, it is enough to say for the discussion of this opinion we do not concur in this construction.

It is also argued that appellees are not the "only heirs" of Robert L. Gibson. This is a question of fact upon upon an affidavit of Mrs. Gibson, showing the kinship of appellees. The above rules is not in conflict. Appellees are in no position to be heard except upon the sufficiency of the will itself, and therefore under certain circumstances that appellees are heir heirs of Robert . Whether and this place is property and income according and (sense) Decision is right they are entitled under the will. In which event the (sense) decision statoon set forth the relative and property rights is remanded their interests pending ultimate determination of the suit.

But do we agree with or even disagree appellees' contention that certain provisions of the will are void as perpetuity. Accordingly the order of consideration will be affirmed.

Affirmed.

Gardner, P. J., and Kirk, J., concur.

(3547a)

7 - 28334

EMANUEL MENDELSON,
Defendant in Error,

vs.

MERCANTILE MOTOR INSURANCE EXCHANGE, incorporated, and CONSOLIDATED INSURANCE AGENCIES, incorporated,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

232 I. A. 226

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The Municipal Court entered judgment against defendants upon an inter-insurance contract providing indemnity against loss by theft of the plaintiff's automobile. The contract purports to be issued in the name of "The Subscribers at the Mercantile Motor Insurance Exchange of Chicago, Illinois," and is signed in the name of that exchange "By Consolidated Insurance Agencies, Inc., Attorney in Fact." An affidavit of merits was filed by each defendant, in which joint liability was denied. A jury was demanded and when the case came on for trial plaintiff and his witnesses appeared in court, but the defendants were not present. Thereupon a jury was called and sworn to try the issues. Four witnesses were sworn, but none of them testified. The plaintiff's attorney made a statement to the jury telling them what the plaintiff claimed, and produced and read to the jury the insurance policy referred to (by date and number only) in the statement of claim. Without further evidence, the court directed the jury to return a verdict in plaintiff's favor for $1200 against both defendants, which was done. A motion for a new trial was afterwards made and overruled, and a judgment entered on the verdict.

MARGUERITE BOLLENBACH, Intervenor in error,	
vs.	
MARGUERITE, WOMEN INSURANCE COMPANY, Incorporated, and DANIELSVILLE INSURANCE COMPANY, Incorporated, Plaintiffs in error.	

MR. JUSTICE FINCH DELIVERED THE OPINION OF THE COURT.

The municipal court entered judgment against defendants upon an inter-insurance contract providing indemnity against loss by theft of the plaintiff's automobile. The instant proceeding is to issue in the name of "The Subscribers of the Dorothville Motor Insurance Exchange of Chicago, Illinois," and it stands in the name of the company "by Dorothville Insurance Company, Inc., Attorney in Fact." On affidavit of merits we filed by such defendant, in which joint liability was denied. A jury was demanded and when the case came for trial plaintiff and the witnesses appeared in court, but the defendants were not present. Thereupon a jury was called and sworn to try the issues. Four witnesses were sworn, and none of them testified. The plaintiff's attorney made a statement to the jury telling them that the plaintiff claimed, and produced one Paul in the jury the insurance policy referred to (by date and number only) in the statement of claim. Without further evidence, the court directed the jury to enter a verdict in plaintiff's favor for $1000 against both defendants, which was done. A motion for a new trial was filed and overruled, and a judgment entered on the verdict.

The judgment is manifestly erroneous. Without proof of the loss of plaintiff's automobile by theft there was no evidence to justify or sustain the verdict. Moreover, the evidence clearly shows that the "Consolidated Insurance Agencies, Inc." is not liable on the policy. It signed the policy only as an attorney in fact for the "subscribers at the Mercantile Motor Insurance Exchange." The policy in question seems to have been written before the passage of the act of 1921 regulating "the business of reciprocal or inter-insurance" (Cahill's Statutes, chap. 73, p. 1948); and there may be some question as to whether the right given by that act to sue the "subscribers" by the name of the exchange applies to actions brought upon such contracts made prior to July 1, 1921. As that question is not discussed in the briefs of counsel, we express no opinion upon the same. For the purposes of the present case, it is enough tp say that for the errors indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

The problem is similarly presented. Subject matter of the law of plaintiff's admissible by itself there was no evidence to justify or sustain the verdict. However, the evidence clearly shows that the "Commissioner Lamphere operates, Inc." is not liable on the policy. It appears the policy only on an endorsement to that for the "Independent or the Barnstable Motor Insurance Company." The policy in question could be duly issued within the meaning of the act of 1921 regulating "the business of reinsurance or insurance" (Mass.Ann.Laws, chap. 175, s. 2[2]; and there may be some question as to whether the right lines by that act to use the "independent" in the name of the company applies to without brought upon such contracts made after July 1, 1921. - that question is not in issue in the trial of counsel, as appears on opinion upon the issue. For the purposes of the present case, it is sufficient to say that the error indicated, the judgment is reversed for the plaintiff demanded.

Judgment for plaintiff.

Braley, J. J., and Sherman, J., concur.

(3548a)

S - 28335

HARRY SCHULAN,
Defendant in Error,

vs.

MERCANTILE MOTOR INSURANCE EXCHANGE, a corporation, and CONSOLIDATED INSURANCE AGENCIES, a corporation,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

232 I A 626

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court for $1,500 claimed to be due him upon an insurance policy issued by the defendants, insuring plaintiff against loss of his automobile by theft. The statement of claim avers that plaintiff's machine was stolen sixteen days after the date of the policy, and that plaintiff promptly reported the theft to the defendants, but they have refused to pay. Each of the defendants filed an affidavit of merits. That of the Insurance Exchange denies that it is a corporation and denies that it entered into any contract with the plaintiff. That of the Consolidated Insurance Agencies denies making the contract, and denies any liability, joint or several, upon the same. A jury was waived. The record shows there was a trial before the court without a jury, and a finding in favor of the plaintiff with damages of $1,635. Motions for a new trial and in arrest of judgment were denied by the court and a judgment was entered on the verdict. This writ of error followed.

By an order hertofore entered in this court, the bill of exceptions was stricken from the transcript of

BAKER KNIGHT,
Defendant in error,

vs.

MIDCONTINENT POWER DISTRICT
EXCHANGE, a corporation, and
CONSOLIDATED INDUSTRIES CORPORATION,
a corporation,
Plaintiffs in error.

Error to
District Court
of Cooper.

MR. JUSTICE WELCH DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the municipal court for $1,500 claimed to be due him upon an insurance policy issued by the defendants, insuring plaintiff against loss of his automobile by theft. The testimony of plaintiff shows that plaintiff's pleading was joined issues upon the loss of the policy, and that plaintiff promptly reported the loss to the defendants, but they have refused to pay. Both of the defendants filed an objection of pleadings. That of the Insurance Exchange United Cos. is to a motion and charges that it submits into any contract with the plaintiff. That of the Consolidated Industries Corporation similar grounds which the court, and denied the liability, joined of evidence, upon the case. A jury was waived. The court heard the case and found before the entry judgment a jury, and a finding in favor of the plaintiff and judgment of $1,000. Defendants filed a motion and in arrest of judgment which denied by the court and a judgment was entered on the verdict. This writ of error followed.

By an order heretofore entered in this court, the bill of exceptions contains from the transcripts of

record because it was not filed within the time allowed by the Municipal Court. There remains, therefore, only the common law record. All the errors assigned, except one, are such as cannot be considered in the absence of a bill of exceptions. The sole exception is that the amount of the judgment exceeds the amount claimed in the plaintiff's statement of claim. This error is well assigned. It can be cured, however, by remitting the excess if the plaintiff chooses so to do. If, therefore, within ten days after the date of the filing of this opinion the plaintiff shall file in the office of the clerk of this court a remittitur for the sum of $135, the judgment for the remainder, viz., $1500, will be affirmed; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

Gridley, P. J., and Barnes, J., concur.

recent b[illegible] it was not [illegible] within the [illegible] allowed by the municipal court. These [illegible], however, [illegible] the [illegible] law [illegible]. All the [illegible] [illegible], [illegible] [illegible], [illegible] such as cannot be considered in the absence of a bill of exceptions. The only exception is that [illegible] of the judgment [illegible] the amount claimed in the [illegible] [illegible] [illegible]. This error is well [illegible]. It can be cured, however, by [illegible] the evidence if the [illegible] [illegible] [illegible]. If, therefore, within ten days after the date of the filing of this opinion the plaintiff shall file in the office of the clerk of this court a remittitur for the sum of $[illegible], the judgment for the remainder, viz., $[illegible], will be affirmed; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED OR REMITTITUR.

Grubbs, P. J., and Brown, J., concur.

(354a)

214 - 28490

THE CARROLLTON POTTERY COMPANY,
a corporation,
Appellee,

vs.

ALBERT PICK & COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

232 I.A. 627

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The defendant in this case appeals from a judgment rendered against it in the Municipal Court for $3730.62, of which $1,730.62 was the amount claimed by the plaintiff to be due for the agreed price of certain dishes manufactured by the plaintiff and delivered to the defendant under a written contract, and $2,000 was for damages for refusing to receive the remainder of the goods covered by the contract. There was a jury trial in which each party claimed the other had broken the contract and each claimed damages for the alleged breach of the other party. It was stipulated by counsel that no question is raised as to the sufficiency of the pleadings; and the only alleged errors argued by defendant's counsel are, in substance, that the verdict is contrary to the weight of the evidence, and that the court erred in giving certain instructions and in refusing certain others.

On March 26, 1918, while this country was engaged in the war with Germany, the plaintiff was a manufacturer of pottery at Carrollton, Ohio, and defendant was a dealer in such wares at Chicago. Plaintiff had a representative in Chicago named Darden, who, on the date mentioned, secured two orders from defendant for a large quantity of "plain white

THE CHARLOTTE PITCHER COMPANY,
A CORPORATION,

Appellant,

vs.

ALBERT SIDE & COMPANY,
A CORPORATION,

Appellee.

Appeal from
Superior Court
of Jackson.

MR. JUSTICE STONE DELIVERED THE OPINION OF THE COURT.

The defendant in this case appeals from a judgment rendered against it in the municipal court for $272.10, of which $1,72.61 was the amount claimed by the plaintiff to be due for the agreed price of certain chinese mandarin by the manufacturer and delivered to the defendant under a written contract, and $1,100 was for damages for refusing to accept the merchandise of the grade ordered by the contract. There was a jury trial in which both parties claimed the right and produce the contract and each claimed damages for the alleged breach of the other party. In the circumstances in dispute and no question is raised as to the sufficiency of the evidence and the only alleged error relied on is the sufficiency of the instructions, in substance, that the evidence is conclusive in the minds of the arbitrators, and that the minority report in certain certain instructions was in contrary terms.

On March 24, 1911, while this contract was pending in the hands of the manufacturer, the plaintiff sent a sample of pitcher to Dunlap, and accompanied by a letter to each there as follows. Plaintiff had a representative in Chicago named Dunlap, and, on the 24th instant, received the letter from defendant for a little discussion of "China ware

hotel ware," consisting of coffee cups, teacups, saucers, bowls, plates, fruit dishes, ice cream dishes and other dishes, of designated sizes and at specified prices. The plaintiff's "regular line" was the manufacture of dinner ware and the manufacture of hotel ware was a comparatively recent addition to its usual business. These orders were taken by Darden subject to the approval of the plaintiff, and one of the terms of the orders was: "Ship as soon as possible." Darden sent a copy of these orders to the plaintiff, who acknowledged receipt of the same in a letter written to Darden, a copy of which the latter at once sent to the defendant. This letter is dated March 29, 1918, and after acknowledging receipt of the orders, states that "while this finds us in a position where we cannot promise anything, yet we are going to do the best we can and fill these orders as promptly as possible;" that "we will make substantial shipments of the different items as they come through the kilns and keep this up until the orders are complete;" that "our factory resumed operation on Tuesday and * * * we are straining every point possible to get materials in here, and believe that we will be successful in keeping the factory in operation even though we do not turn out full capacity;" that "the help question is very trying now, but we are in hopes of filling up the vacancies before long. We have not as yet got all of the hotel moulds made, but these will come through in due time and we believe that in the course of a couple weeks we will be able to ship a few items on these orders. Some of these items, with the equipment we have now, it would take us eight months to make them, but we are hoping to secure enough men to greatly reduce this time." The prices specified in the orders above mentioned were what is known as "list" prices, from which a dis-

Dutil note," consisting of motive notes, trumpet, saxophone, banjo, piano, Irish drums, low brass timbre and other colours, or contemporary single use of instrument colours. The plasticity "regular line" was the musical theory of Debussy and the Impressionists of Dutil note was a comparatively recent evolution in its musical language. These artists were known to Debussy mainly in the sphere of the plastic, and yet of the theme of the artists said: "This is meant to produce." Debussy said: "Many of these artists in the plastic, the impressionists (people of the soul in a better sense of further), a soul of which the latter is more work in the instrument. This latter is also work by, Dutil, and other contemporary results of the drama, stated that "music also claims as in a painting where to number pressing original, yet so not going to be the best or for use Dutil these colors of principle of painting." that "we will make substantial adjustment of the instruments times in they and through the mind and to go that up until the events are concerned." that "our factory changed constitution on Theory and " " " we are attacking every point possible to pre-suppose in here, and believe that so will be successful in keeping the factory in operation even though we do not turn out full capacity." that "the main question is only trying now, but we are in terms of filling up the vacancies before long. It does not to get all of the Dutil music made, but there will come through in the time and we believe that in the course of a month made to still be able to ship a few items on hand orders. Some of Dutil items, with the equipment we have now, it would take us right months to make them, but we are hoping to secure enough now to actually reduce this time." The prime specialist in the drama which matinees were that is known as "first" period, from about a fir-

count of 25% was allowed, the aggregate net price being $36,298.88.

Plaintiff made its first shipment upon these orders on April 9, 1918, consisting of nearly 400 dozen plates which plaintiff then had in stock, and followed this with other shipments of goods thereafter manufactured, in April, May, June, July and August of the same year, aggregating nearly 8000 dozen of the dishes ordered, worth, at the contract price, about $6,300. These shipments were paid for soon after they were received, the last payment being made September 13, 1918.

On August 10, 1918, in answer to a letter of the defendant requesting information regarding further shipments, plaintiff replied that it had given to understand by the "War Service Board" that plaintiff's entire production of hotel ware would be required by the government, and that "under the circumstances, we see no prospects to be able to deliver you any considerable amount of goods, and think it will be best for you to not count on receiving much additional hotel ware from us." To this letter the defendant replied that it would "most emphatically insist on the completion of our order in its entirety." The plaintiff's factory was closed for three weeks in August, because the plaintiff was unable at that time to get enough coal to keep the factory in operation. When it reopened, the manufacture of the dishes ordered by defendant was resumed. No shipments were made, however, during September, and in October defendant sent an agent to Carrollton to make inquiries. There is a sharp conflict in the testimony as to what occurred when the agent reached Carrollton. The agent testified that the plaintiff's president told him that on account of the difficulties experienced in manufacturing the goods in question, he had found it impracticable to make the same and had concluded to abandon the manufacture of hotel china ware. This was denied by the plaintiff's president and his son, both of whom were present at the time of the conversation. They testified that

count of 32d was allowed, the [illegible] [illegible] [illegible]

they told the defendant's agent that they were working on defendant's orders and intended to complete them, but on account of the working conditions then existing, they could not make any definite promises as to when shipments would be made. The plaintiff's president further testified that the agent angrily demanded that plaintiff fix a definite date for shipments, and when this was refused, accused plaintiff of "cutting prices" in bids submitted to the government, below the prices which defendant was receiving for goods supplied to the Great Lakes Naval Station. Upon the return of the agent to Chicago, defendant wrote a letter to the plaintiff on October 18th stating that the agent had reported that plaintiff refused to make any further shipments on the contract, that "it is absolutely necessary for us to obtain goods with which to supply our customers," that plaintiff's failure to deliver had "inconvenienced" defendant, and that "we would be very glad to have you start to make delivery on your contract at once." Not receiving any immediate reply to this letter, defendant wrote again on November 5, 1918, asking if defendant was to consider the silence of the plaintiff "as indicating an unwillingness to perform the contract." To this letter the plaintiff replied, under date of November 8, 1918, that it had not answered the defendant's letter of October 18th for the reason that plaintiff "did not know of any satisfactory reply to make" that the report of the defendant's agent "was not in accordance with the facts, and, noting your trend in that letter, took for granted that this was an ultimatum and that further correspondence was useless." On November 11, 1918, defendant wrote again, asking if it was to understand from plaintiff's last letter that plaintiff did not intend to comply with the contract, and requesting a definite answer. Plaintiff did not reply to this letter, but, eleven days later, on November 22, 1918, made a shipment to defendant of 1897 dozen of butter plates, worth at the contract price, $524.40, and followed this,

they told the Intendant's aides that they were ready to accommodate's orders and somewhat to compromise them, but as usually at the prelude contingent upon existing, they really was quite and difficult problems so to come alongside until to early. The quantity's president further initial that the worst quantity assumed that quantity fix a initial side for outcomes, and even that was accepted, assumed quantity' or 'initial grains' is high questions on the government, there the areas that intended our existing for grade supplies to the state under final fixing. Upon the issues of the agent to origins, material would a initial in the quantity on October 4th relative that the would has constructed that fundamentally refused to make the further disparate on the questions, that is an absolutely necessary for us to secure peace with mine to supply our matters." that quantity' refuses to origins the 'grown-ups' of which, and that the would be very glad to take you state to make advance on your quantity's view." Not considering the immediate crisis in this letter, Alexander wrote again on November 1, 1917, asking if arrangements had to consider the claims of the quantity "in trying to conciliate to action the specific." In this letter the quantity' replied, under date of November 8, 1917, that it had not accepted the Intendant's offer of October 4th for the reason that quantity' "is not done of any satisfactory reply to what" that the answer of the Intendant's agent "has not to satisfactorily with the facts, and, rather that treat in this letter, that the grounds that was no disagreement and that the further correspondence was unwelcome." On November 14, 1917, Alexander wrote again, asking if it was to accepted from quantity's last letter that quantity' had not issued in reply with the contract, and requesting a satisfactory answer. Finally the not reply to this letter, but, answer this later, on December 20, 1917, made a statement of quantity of the terms of Lenin's plans, with at the quantity's price, 1917, and following was:

within a month thereafter, with three other shipments of coffee cups and other dishes. The aggregate of these four shipments was $1,730.62, and this was never paid.

So far as the record shows, no objection was made by defendant to receiving these last shipments, until December 18, 1918, when all but the last of the four had been received by defendant. On that date, defendant sent to the plaintiff a long letter, stating that on March 29, 1918, plaintiff, in acknowledging receipt of defendant's order of March 26, 1918, had "promised to make substantial shipments continuously and indicated that you would be able to fill the order in materially less than eight months;" that "your shipment of goods under this order was trifling and practically amounted to a total failure to comply with your contract;" that "on October 18th, we called your attention to the heavy loss we had suffered through your failure to fill the contract, but indicated a willingness on our part to receive the goods, provided you would commence shipments promptly, and would advise us that you would fill the contract;" that when no reply to this letter was received, defendant had written, on November 5th, asking "whether we should consider the contract canceled by you and should bring suit," to which the plaintiff had replied, in substance, that "any further correspondence would be useless;" that on November 11th, defendant had again written, asking "if we were to understand from your letter that you did not intend to comply with your contract;" to which no reply had been made; that after waiting over a month for a reply, defendant had "assumed that you proposed to make no further effort to fulfill your contract, and therefore considered it canceled." Then, referring to the last shipments, made "within the last few days," the letter states that "upon your failure to reply to our letter of November 11th, we considered ourselves entitled

within a month therefore, with those other shipments of valves, caps and other items. The shipments of these four documents was $1,730.00, and this was never paid.

So far as the record goes, no objection was made by defendant to receiving these last shipments, until December 12, 1952, when all but the last of the four had been received by defendant. On that date, defendant sent to the plaintiff a long letter, stating that on March 24, 1952, plaintiff, in acknowledging receipt of defendant's order of March 14, 1952, had "promised to make substantial shipments monthly and indicated that you would be able to fill the order in substantially less than eight months;" that "your acceptance of payment and your order was fulfilling and practically amounted to a total failure to comply with your contract;" that "on October 24th, at which your attention to the heavy loss we had suffered through your failure to fill the contract, has indicated a willingness on our part to receive the goods, provided you would commence shipments promptly, and would advise us that you would fill the contract;" that when no reply to this letter was received, defendant had written, on November 6th, asking "whether or should regulate the contract canceled by you and should bring suit," to which the plaintiff had replied, in substance, that "our further correspondence would be useless;" that on November 11th, defendant had again written, asking "if we have to commence from your letter that you did not intend to comply with your contract;" to which no reply had been made; that after waiting over a month for a reply, defendant had concluded that you preferred to make no further effort to fulfill your contract, and therefore considered it cancelled." Then, referring to the last shipments, made "within the last few days," the letter states that "upon your failure to reply to our letter of November 11th, we considered ourselves entitled

to - and did elect to - consider our contract with you ended on account of your failure to perform the same and * * * your indication that you did not propose further to try to comply with the contract, and we certainly cannot permit you, now that the war is ended, to assume that that contract remains in force, so that you can make shipments under it at your pleasure." The letter closes by saying: "Please understand that we have a large claim against you for damages * * and that any goods sent to us will be applied, at their reasonable market value at the time of receipt, to our claim against you for damages, but that no goods will be received under the terms of the abrogated contract."

Plaintiff made no further shipments after receiving this letter. There is undisputed evidence to the effect that at the time this letter was written, plaintiff had in its factory, in process of manufacture, about $10,000 worth of goods ordered, which plaintiff was obliged to, and did, thereafter sell to others for a sum considerably less than the price fixed in the contract. There is also uncontradicted evidence tending to prove that the difference between the cost of manufacturing the remainder of the goods ordered, and the contract price of the same, was $2000. There is some evidence tending to prove that after the date of the contract the market price of such goods advanced, and there is evidence to the contrary.

The contention of defendant's counsel in this court is substantially a repetition of the claim of the defendant, as stated in its letter of December 18, 1918, viz.: that the partial performance of the contract on the part of the plaintiff was of a trifling character and indicated an intention on the part of the plaintiff not to perform, that further performance on its part was definitely abandoned in October, 1918, that defendant then elected to terminate the contract, and that the

to - and did start to - negotiate our contract with you based on
account of your failure to perform the same and * * your in-
dication that you did not expect further to try to comply with
the contract, and as certainly indeed points, was that the
car is ended, to assume that that contract remains in force, so
that you can make arrangements under it is your discretion.' The
letter closes by saying: 'Please understand that as both a
large claim against you for damages * * and that any people work
to us will be waiting, at their reasonable market value if the
time of receipt, to our claim against you for damages, but that
no goods will be received under the terms of the aforesaid con-
tract.'

Plaintiff made no further attempts after receiving
this letter. There is undisputed evidence to the effect that
at the time this letter was written, plaintiff had in its factory,
in process of manufacture, about $10,000 worth of goods ordered,
which plaintiff was obliged to, and did, thereafter sell to
others for a much considerably less than the price fixed in the
contract. There is also uncontradicted evidence tending to prove
that the difference between the cost of manufacturing the remainder
of the goods ordered, and the contract price of the same, was $8000.
There is some evidence tending to prove that after the loss of
the contract the market price of such goods advanced, and there
is evidence to the contrary.

The contention of defendant's counsel in this court
is substantially a repetition of the claim of the defendant,
as stated in its letter of December 10, 1919, viz.: that the
partial performance of the contract on the part of the plaintiff
was of a building character and indicated an intention on the
part of the plaintiff not to perform, that further performance
on its part was definitely abandoned in October, 1919, that de-
fendant then elected to terminate the contract, and that the

shipments made after November 11, 1918 (Armistice Day), evince an intention on the part of the plaintiff to renew the "abrogated" contract without the defendant's consent or permission. Plaintiff met this contention in the trial court by introducing evidence tending to prove that plaintiff exercised such diligence in the manufacture of the specified articles of china ware as was reasonably possible under the conditions prevailing during the last year of the world war. It was shown by uncontradicted evidence that the manufacture of china ware is a slow, tedious process, involving the use of prepared models, plaster casts and moulds; that the average time required in the plaintiff's factory for manufacturing and finishing such china ware as defendant ordered, was about sixty days, under normal conditions, when the factory had on hand all the clay, plaster of paris, silica and other materials required for the manufacture of the same, and when the factory is operated continuously; that during that part of the year 1918 prior to Armistice Day, however, the factory was often necessarily shut down because of the inability of plaintiff to secure enough fuel to operate it continuously; that because of conditions occasioned by the war then in progress, the plaintiff was unable to procure the necessary materials except at long intervals and after much delay; and that many of the plaintiff's skilled workmen were taken away through the operation of the draft that was then in force. The president of the plaintiff company testified that the base of the body of the kind of plain white china ware described in the contract is Kaolin, or English china clay, which is imported from England; that no domestic clay can be successfully used; that on April 26, 1918, a steamer upon which plaintiff had a consignment of ten carloads of Kaolin was torpedoed; and that during most of the month of August, 1918, the factory was closed because the "embargo" on the railroads at that time prevented the plaintiff from getting a supply of coal. Many facts and circumstances

adjustment. Late after January 11, 1944 (Tuesday, July), without an intimation on the part of the plaintiff to raise the "impossible" contract without the defendants' consent or knowledge. Plaintiff will not call attention in the trial which by interpretation attempts leading to prove that plaintiff encountered much difficulty in the manufacture of the specified articles of which such he was reasonably possible under the conditions prevailing during the last year of the world war. It was shown by documentary evidence that the manufacture of this sort is a slow, tedious process, involving the use of prepared metals, velocity tests and molds; that the average time required in the plaintiff's factory for manufacturing and finishing such units were as difference evidence, one about eight days, under normal conditions, when the factory has on hand all the clay, plaster of paris, tools and other materials required for the manufacture of the mold, yet when the factory is strained economically; this during that part of the year that prior to December 7th, however, the factory was often unavoidably that such because of the inability of plaintiff to secure enough tool to operate it economically; that because of conditions occasioned by the war then in progress, the plaintiff was unable to procure the necessary materials except at long intervals and after much delay; and that many of the plaintiff's actions complained were taken only through the operation of the Court only and then in haste. The evidence of the plaintiff's company witnesses that the time of the work of the kind of plain molds were therefore in the machine is indefinite, or taking other step, which is imperfect from defendant; that no domestic ship has be manufactured; that at least 50, 100, a number upon which plaintiff had a manufacture of the materials of testing are temporary, and that nothing such of the month of August, 1943, the factory was ordered because the "shortage" on the plaintiff's in that prevented the plaintiff from getting a supply of steel. Many facts and circumstances

of like character were related by this witness and by the factory superintendent which tend to support the plaintiff's contention that although the shipments made by the plaintiff prior to Armistice Day were relatively small, yet the plaintiff was "doing its best" under the then existing circumstances to fill the defendant's orders "as promptly as possible," which was all the plaintiff, in its written acceptance of March 29, 1918, had promised to do. On the other hand, there is evidence from which the contrary may be reasonably inferred, and defendant's counsel have fully presented that phase of the case. In view of the extended argument on these questions of fact, made by counsel on both sides, we have carefully examined all the evidence contained in the record, and after giving due consideration to the arguments presented, we are unable to say that the verdict of the jury is manifestly contrary to the greater weight of the evidence. While defendant's letter of October 18, 1918, shows that defendant was not satisfied with the shipments that had been made up to that time, yet the same letter shows that defendant did not then elect to cancel the contract on that ground, but was willing to accept further shipments under the contract, provided plaintiff "would commence shipments promptly," and advise defendant that the contract would be performed. The evidence shows without contradiction that the work was then going ahead in the factory and we think the preponderance of the evidence shows that shipments were thereafter "commenced" as promptly as could be reasonably expected under the circumstances. The failure of plaintiff to reply to defendant's letters demanding a categorical statement as to plaintiff's intention to perform or not to perform, was unnecessary if, as the plaintiff's witnesses testified, the defendant's agent was informed when he visited the plaintiff's factory in October that plaintiff was working on defendant's orders and intended to complete them. If such

of like inferences were relevant to this element but by the factory superintendent which sought to support the plaintiff's contention that although the statements made by the plaintiff prior to instituting the were relatively small, yet the plaintiff was "going its work" under the then existing circumstances to fill the defendant's orders "as promptly as possible," which was all the plaintiff, in the written acknowledgment of March 26, 1918, had promised to do. On the other hand, there is evidence from which the jury may be reasonably inferred, the defendant's general have fully presented that phase of the case. In view of the extended argument on these questions of fact, made by counsel on both sides, we have carefully reviewed all the evidence contained in the record, the error giving due consideration to the comparative strength, as we conceive to be, that the verdict of the jury is manifestly against the greater weight of the evidence. While the plaintiff's letter of October 1st, 1918, shows that defendant was not satisfied with the shipments that had been made up to that time, yet the same letter shows that defendant did not then seek to cancel the contract on that ground, but was willing to accept further shipments under the contract, provided plaintiff would assume enhanced priority, and would informed that the shipments would be performed. The evidence shows without contradiction that the work was then going ahead in the factory and we think the preponderance of the evidence shows that although were insufficient "emergency" or priority to shall be reasonably adjusted under the circumstances. The failure of plaintiff to reply to defendant's letter demanding a satisfactory statement as to plaintiff's intention to fulfill or not to perform, was unnecessary if, on the plaintiff's strenuous testimony, the defendant's agent was informed then by telling the plaintiff's factory in order that plaintiff was working on defendant's orders and intending to complete them. It much

were the facts, the mere failure of plaintiff to reply to defendant's letters was not of itself proof of a contrary intention, and afforded no sufficient ground for defendant's alleged election to cancel the contract, especially in view of the fact that such alleged election was not made until several later shipments had been received by defendant.

As to the alleged errors in the given instructions, it will be enough to say that we have examined such instructions, and find no reversible error in the action of the court. Both the refused instructions tendered by the defendant, of which complaint is made, are involved and misleading. The eleventh instruction, in which the legal effect of the defendant's receipt and acceptance of the last shipments is attempted to be set forth, ignores the undisputed fact that up to the time said shipments were made and the goods received and accepted by the defendant, it had never in any manner acquiesced in or consented to any alleged "renunciation" of the contract by the plaintiff, but had always treated it as a subsisting contract and always insisted on full performance thereof by the plaintiff.

For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

[illegible] - [illegible]

[illegible] C. A. Atkins,

Plaintiff,

vs.

John Gates and Elizabeth Gates,

Defendants.

[illegible]

[illegible] Petition for [illegible] of the [illegible].

The plaintiff, who is a [illegible] and operates a [illegible] in [illegible], in [illegible] County, sues the defendants to recover [illegible], alleged to be due on the balance due on the [illegible] and [illegible] treatment rendered to the hospital in the [illegible] of defendant of the defendants. The main defense was that plaintiff was guilty of negligence in the treatment of the child. There was a trial before the court without a jury, at the conclusion of which the court found for plaintiff on the counterclaim, and for a judgment against defendant for the plaintiff upon.

The proposition of law more pertinent in the trial court and there is no dispute between counsel in this court as to the law of the case. Specifically the main question involved on this appeal is one of fact. The plaintiff performed the operations on the child, the first the tonsils, and the second, which was later, for [illegible] of the tonsils. The child remained in the plaintiff's hospital from the time of the first operation until a few days after the second operation, some [illegible]. The plaintiff testified that both operations were necessary, and that he used reasonable skill in performing them. The father of the child testified

that after the first operation he asked the plaintiff what the cost would be, and the plaintiff told him that "for a serious operation of this kind with an assistant and all necessary care," it would be $200 and $10 for the operating room and $10 for "something else." The father paid the plaintiff $220. A special nurse was also employed and the father likewise paid her bill in full. There was evidence tending to prove that for five or six weeks following the first operation the child, to all appearances, gradually improved in appearance and strength; that at the end of four weeks the wound was almost closed and the plaintiff told the father that the child was out of danger and that the services of the special nurse could be dispensed with, assuring him that some one of the three nurses regularly employed by him at his hospital would give the child as good care as the special nurse had given; that the special nurse remained a couple of weeks longer, however, because the child had been frightened by one of the other nurses and was afraid of her; that when the special nurse left, she told the other nurse that the child must have an enema every other day, to which the latter replied: "It is my business;" that thereafter the other nurse did not give enemas, and when the mother remonstrated, said she "didn't have to follow orders;" that she neglected the surgical dressings until the child's skin was raw and inflamed; that she handled the child so roughly that the child screamed; that the child was scalded "because she wet the bed;" that the food furnished was at times unfit to eat; and that, finally, after a week or more of this treatment, the child began vomiting and her wound re-opened; that for nearly twenty-four hours thereafter the plaintiff did not visit the child and could not be located; that the next day, as soon as he saw the child, he told the defendants that he must perform another operation "to repair the damage;" that the mother

then after the first morning he asked the physicist what the best would be, and the physicist told him that "for a serious operation of this kind -if he wanted the job done well and necessary care," it would be 100. And so for the operating room and for any "something else." The fellow said the physicist 100. . A physical nurse was also employed and the sister in charge paid her just as full. There was evidence tendered to prove that for five or six weeks following the first inoculation the child, a girl seven-teen, gradually improved in consciousness and strength, and in the end of four weeks she could see clearly always and the physicist told the father that he could see not of danger and that the services of the special nurse would be dispensed with. Evidence was that some one of the first nurses probably responsible for the at bin hospital would give the child an opal wash on the inward nurse had given, that the inward nurse received a single of weak lysol. However, however the nurse had been dismissed in one of the other nurses had her attention to keep the special nurse left, she said the other nurse had the child just have an enema every other day. In which the latter replied: "It is my business;" that nevertheless the other nurse did not give enema, and when the sister remonstrated, said she "didn't have to take orders;" that she proceeded the nurse and the child's mother from the room and followed, that she treated the child so roughly that the child screamed; that the child was treated "because she met the Devil;" that the food furnished him at times made to sick and dizzy itself; after a week or more of this treatment, the child began vomiting and was seized convulsions; that for nearly twenty-four hours thereafter the physicist did not visit the child and could not be informed; that the nurse, on about the 10th day, to tell the physicist that he was not con-fore monthly examination "he expect to manage;" that the mother

protested that the child was too weak to undergo another operation, but the defendant, nevertheless, called another physician, who performed the second operation, and the child died soon after from "surgical shock." In rendering his decision the trial judge said: "I don't see how anybody could sit and listen to this evidence and not feel that this girl was neglected." We have read the evidence in the record and we are of the same opinion.

Plaintiff's counsel complains of some of the rulings and remarks of the court on the admission of evidence. We have examined the record with reference to these matters, and are of the opinion no reversible error was committed.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

[illegible] that the [illegible] not [illegible] to [illegible] [illegible] [illegible],
and the [illegible], [illegible], [illegible] [illegible] [illegible], the
performed the [illegible] [illegible], and the [illegible] [illegible] [illegible] [illegible]
"[illegible] check." In [illegible] the [illegible] [illegible] [illegible] [illegible]
"I don't see how [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
not [illegible] [illegible] [illegible] [illegible]." [illegible] [illegible] [illegible] [illegible]
in the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

Alternative [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
and [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible]. [illegible] [illegible]
[illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible], and are of
the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

The [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

[illegible].

[illegible], T., J., and [illegible], J., [illegible].

(351 a)

289 - 28565

BERNARD COONEY, a minor, by Mary Cooney, his mother and next friend, Appellee, vs. CHICAGO RAILWAYS COMPANY et al., Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

232 I.A. 327

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a judgment for $1,000 for personal injuries sustained by the plaintiff when he was struck by one of the defendants' street cars upon North avenue at St. Louis avenue, in Chicago. The only question raised by defendants is that the verdict is contrary to the evidence. The accident happened about half past five in the evening of January 2, 1921. North avenue runs east and west, with a roadway of unusual width. It has upon it a double line of street car tracks, and the trolley posts are in the center of the street. St. Louis avenue runs south from North avenue. It does not cross North avenue. A short distance west of the west line of St. Louis avenue extended, a street called Hancock avenue enters North avenue from the north, but does not cross it. The distance between the west line of St. Louis avenue extended north, and the east line of Hancock avenue extended south, is estimated by one of the witnesses at fifty or seventy-five feet. The next street which crosses North avenue west of Hancock avenue and St. Louis avenue, is Central Park avenue. Just before the accident the plaintiff, then a boy twelve years old, and another boy fourteen years of age, were walking east on the north side of North

[illegible] COUNTY, a minor,
by [illegible] Conner, his mother
and next friend,

Appellee,

vs.

PRIDGEO [illegible] MOTOR
et al.,

Appellees.

[illegible] ALLOT,

[illegible] COUNTY,

[illegible]

Mr. Justice [illegible] delivered the opinion of the court.

By this direct [illegible] appeal is sought a judgment for $2,000 for personal injuries sustained by the plaintiff when he was struck by one of the [illegible] cars upon North Avenue at St. Louis Street, in Chicago. The only question raised by [illegible] is that the verdict is contrary to the evidence. The accident happened about half past five in the evening of January 8, 1923. Both streets were dark and wet, with a [illegible] of [illegible] traffic. At the [illegible] it is a double line of [illegible] car tracks, and the [illegible] are in the center of the street. Mr. [illegible] came from North Avenue. It does not [illegible] evidence, [illegible] distance west of the west line of St. Louis Avenue [illegible] a street [illegible] [illegible] from the north, but does not cross it. The [illegible] between the west line of St. Louis Avenue extended north, and the east line of Spaulding Avenue extended north, is occupied by one of the [illegible] of City [illegible] Park. The [illegible] section crossing North Avenue east of Spaulding Avenue and St. Louis Avenue, is [illegible] [illegible]. [illegible] the evidence the plaintiff, then a boy twelve years old, was another [illegible] years of age, were walking west on the north side of North

avenue, on their way to a motion picture theater on the south side of North avenue, east of St. Louis avenue. After crossing Hancock avenue and reaching a point about opposite the west sidewalk of St. Louis avenue, they turned south to cross North avenue. Both boys testified that as they stepped from the curbstone into the street, they looked up and down the street and saw no traffic except a street car half a block away, approaching them from the west, and apparently slowing down at a "regular stopping place," (indicated by stop-signs reading "Cars stop here"); that thereupon they walked straight south toward the sidewalk on the west side of St. Louis avenue; that as they reached the north rail of the west bound track, they looked again and saw the street car a quarter of a block away, moving slowly; that no gong was heard by them; that they then went on across the first tracks, and the plaintiff, who was ahead, was struck by the left-hand front corner of the street car and knocked down. Plaintiff's companion, who was two or three feet behind, testified that plaintiff was thrown against a trolley post. In this, however, he is not corroborated by any other witness, and there is evidence tending to prove that there was no trolley post at the west line of St. Louis avenue. The witnesses agree that plaintiff "got up and staggered toward the curbstone." A passerby, noticing this and that plaintiff's head was bleeding, assisted the plaintiff to a drug store at the southeast corner of St. Louis avenue and North avenue, where first aid was given, and he was then taken home and a doctor called. The doctor described the injury as a cut about three inches long on the left side of the head above the temple - "a dirty, infected wound," with the scalp torn loose, "so that it could be picked up in examining." The doctor had the plaintiff taken to a hospital, where the wound was cleansed, sutured, dressed and drainage established. The infection increased, with much swelling and pain, which gradually subsided. The boy

avenue, on their way to a motion picture theater on the south side of Morris avenue, east of St. Louis avenue. They proceeding northeast across and reaching a point about opposite the west sidewalk of St. Louis avenue, they turned south in front North avenue. Both have identified their co-tort stepping from the curbstone into the street, they looked up and down the street and saw no traffic except a street car half a block away, approaching them from the east, and apparently slowing down at a "regular stopping place." (Interpreted by step-saying reading "Here stop here"); that thereupon they walked straight (not toward the sidewalk on the west side of St. Louis avenue; that as they reached the north rail of the east bound track, they looked again and saw the street car a quarter of a block away, moving slowly; that no gong was heard by them; that they then went on across the first track, and the plaintiff, who was alone, was struck by the left-hand front corner of the street car and knocked down. Plaintiff's companion, who was two or three feet behind, testified that plaintiff was thrown against a trolley post. In this, however, he is not corroborated by any other witness, and there is evidence tending to prove that there was no trolley post at the west line of St. Louis avenue. The witnesses agree that plaintiff "got up and staggered toward the curbstone." A physician, noticing this and that plaintiff's head was bleeding, assisted the plaintiff to a drug store at the northwest corner of St. Louis avenue and North avenue, where first aid was given, and he was then taken home and a doctor called. The doctor described the injury as a cut about three inches long on the left side of the head above the temple - "a dirty, infected wound," with the small bone broken "so that it could be placed up in something." The doctor had the plaintiff taken to a hospital, where the wound was cleansed, sutured, dressed and drainage established. The infection increased, with much swelling and pain, which gradually subsided. The day

was in the hospital for about a month.

No question is raised as to the amount of the verdict, which seems to be reasonable in view of the nature of the injury. The defendants claim the case is a "blind" one, meaning that their claim department had no report of the accident. They produced as a witness the druggist's clerk, or assistant, who was in the drug store at the time the plaintiff was taken there, and who testified that the first thing he did when plaintiff was brought in was to ask the boy how the accident happened, and that plaintiff replied by saying that he was "flipping" a car. The plaintiff denied making any such statement, and the young man who assisted him to the drug store testified that he heard nothing of the kind while he was there. These contradictions and the statement of the plaintiff's companion that plaintiff was thrown against a trolley post, furnish the ground for an extended argument by defendants' counsel as to the credibility of plaintiff's witnesses, and an equally extended attack by plaintiff's counsel upon the credibility of the druggist's clerk. We have read and fully considered the arguments presented and have carefully examined the abstract of the testimony, and we are unable to say that the verdict of the jury was manifestly contrary to the greater weight of the evidence.

Defendants' counsel insist that plaintiff's evidence shows a case of a boy, old enough to know better, suddenly darting in front of a carefully managed street car, and that therefore a verdict for defendants should have been directed. We find little in the evidence to support this theory. On the contrary, we find uncontradicted evidence from which the jury might reasonably find that the plaintiff and his boy friend, with such care as would reasonably be expected of boys of their age, were proceeding across the car tracks at a street crossing a sufficient distance in front of the approaching street car to

ve in the hospital for about a month.

The question is raised as to the amount of the verdict, which seems to be reasonable in view of the nature of the injury. The defendants claim the case is a "close" one, insisting that their claim disclaimers had no effect of the accident. They introduced as a witness the manager's clerk, an employee, who was in the drug store at the time the plaintiff was injured, and who testified that the clerk told he did move quickly and brought in one to sell the bar-be- lel [illegible] Mustard, and that plaintiff replied by saying that he was "finishing" a car. The plaintiff denied making any such statement, and the young man who supplied him to the drug store testified that he heard nothing of the kind while he was there. These contradictions and the statement of the plaintiff's companion [illegible] plaintiff was [illegible] against a truly jury, forcing the grounds for an extended argument by defendants' counsel as to the credibility of plaintiff's witnesses, and an equally extended argument on plaintiff's counsel upon the credibility of the defendant's witnesses. We have read and fully considered the arguments presented and have carefully examined the testimony of the witnesses, and we see nothing to say that the verdict of the jury was manifestly contrary to the greater weight of the evidence.

Defendants' counsel insists that plaintiff's evidence showed a case of a fall, and cannot be more heard, mentioning darting in front of a carefully managed street car, and that therefore a verdict for defendants should have been directed. We find little in the evidence to support this theory. On the contrary, we find uncontradicted evidence from which the jury might reasonably find that the plaintiff had his only friend, with such care as would reasonably be expected of boys of their age, were proceeding across the car tracks at a street crossing a sufficient distance in front of the approaching street car to

have enabled them to cross in safety if the motorman had exercised due care in driving the street car; and that the motorman negligently increased the speed of the street car just before the accident and in consequence the plaintiff was injured. The distance from the north rail of the west-bound track to the north rail of the east-bound track was thirteen feet. If the boys' story is true, that the street car was a quarter of a block away and moving slowly when they stopped upon the north track, then the street car must have traveled thereafter a quarter of a block while the plaintiff was walking thirteen feet. "It was a long block," said the plaintiff's companion. The plaintiff, twelve years old, who was ahead, thought he had time to cross and went on. The plaintiff's companion, two years older and several feet behind, thought otherwise and stepped. There was nothing to obstruct the motorman's view of these boys as he approached them. Under such circumstances, the questions of negligence of the defendants and contributory negligence of the plaintiff were questions for the jury to decide from the evidence. Loftus v. Chicago Rys. Co., 293 Ill. 475, 479.

The judgment of the Superior Court will be affirmed.

AFFIRMED.

Grudley, P. J., concurs;
Barnes, J., dissents.

have reached them in order to avoid the accident had defendant
due care in driving the street car; and that the motorman negligently increased the speed of the street car just before the
accident and in consequence did negligently run against. The distance from the north rail of the east-bound track to the south
rail of the west-bound track was undisputed fact. If the story
story is true, that the street car was a matter of a block away
and moving slowly when they stepped upon the north track, then
the street car must have traveled forward a matter of a block
while the plaintiff was making uninvited fact. "It was a long
block," said the plaintiff's companion. The plaintiff, twelve
years old, was run down, thought he had time to cross and was
on. The plaintiff's companion, two years older had plenty I felt
behind, thought other also had tracks. Both were walking in ab-
sence the companion's view of those have to be approached when.
under such circumstances, the positions of negligence of the in-
fendants and contributory negligence of the plaintiff were questions
for the jury to decide from the evidence. Dalton v. Chicago Ry.
Co., 243 Ill. 474, 479.

The judgment of the superior court will be affirmed.

AFFIRMED.

Crabtree, J., concurs;
Barnes, J., dissents.

(3552a)

347 - 28627

H. C. ZUENERT,
Appellant,

vs.

KARL MATHEUS and MRS. KARL MATHEUS, doing business as The Majestic Belt Company,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

2321.A.627

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Eighty days after the entry of a default judgment against defendants in the Municipal Court, the defendants' attorney, in their behalf, filed a petition therein to set aside the judgment. When the petition came on for a hearing the plaintiff filed a motion in writing to strike the petition from the files on the ground that the petition was insufficient in law to confer jurisdiction upon the court to vacate the judgment. The court denied the motion to strike and the plaintiff electing to stand by his motion the judgment was thereupon vacated. From that order the plaintiff appeals.

The record shows that no motion to vacate, set aside or modify the judgment was made within thirty days after the judgment was rendered, and the sole question presented on this appeal is whether the facts alleged in defendants' petition thereafter filed were sufficient to authorize the court to vacate the judgment under the rule prescribed in section 21 of the Municipal Court Act.

The petition to vacate, which is signed and sworn to by defendants' attorney "on behalf of the defendants," states that on August 29, 1922, an order was entered in said cause requiring the plaintiff to file within ten days a more

347 - [illegible]

G. F. [illegible],

Appellant,

vs.

[illegible] and [illegible], [illegible] [illegible], being [illegible] in the Majestic [illegible] Company,

Respondents.

[illegible]. Motion to strike the answer on the ground.

[illegible] case arose on the issue of a material [illegible] against defendants in the [illegible] suit, the defendants' attorney, in their behalf, filed a pleading which is not under the judgment. When the pleading came on for a hearing the plaintiff filed a motion to strike to strike the motion from the files on the ground that the pleading was insufficient in law to confer jurisdiction upon the court to review the judgment. The court denied the motion to strike and the plaintiff elected to stand by the ruling the judgment was thereupon vacated. From that order the plaintiff appeals.

The record shows that no motion to vacate, nor notice of motion to the judgment was ever filed. Only a few days after the judgment was rendered, and the well pleading presented to this court in matter the Paris Alliance to [illegible] [illegible] thereafter filed were sufficient to authorize the [illegible] to vacate the judgment under the rule promulgated in [illegible] of the Municipal Court act.

The petition in error, which is signed and [illegible] to by [illegible] attorney on behalf of the defendants, states that on August 19, 1920, an order was entered in said cause requiring the plaintiff in this action the sum of [illegible]

specific statement of claim, and extending defendants' time in which to file an affidavit of merits for ten days thereafter; that twenty-two days after said order was entered, viz., on September 20, 1922, a judgment by default was entered against the defendants for $631.11, "it appearing to the court that the defendants had failed to file their affidavit of merits;" that on September 23, 1922, he (the attorney) filed a separate affidavit of merits for each defendant; that "he thought he was filing the same within the time allowed for so doing by the court," and that his failure to file the same on or before the 19th day of September, 1922, "was entirely due to his, your petitioner's, mistake, and cannot in any manner be chargeable to either of the defendants herein;" that his mistake consisted of making his memorandum of the time for filing such affidavits "upon the wrong page of his memorandum book;" that he filed such affidavits in good faith, and that because a jury demand had been made in the case "it did not occur to your petitioner to check over the bulletin, nor examine the court files either before or at the time of filing said affidavits of merits;" that he was "absent from the city on business during most of the month of October and did not return until a few days prior to the date of preparing this petition" (which is sworn to December 2, 1922), when one of the defendants told him that a bailiff was seeking to serve some kind of a paper on the defendants, "whereupon your petitioner examined the court files" and learned for the first time that a judgment had been entered; that he verily believes the defendant Karl Matheus has a meritorious defense "to at least a very substantial part, if not the entire claim of the plaintiff," and believes Mrs. Karl Matheus has a meritorious defense to the whole of such demand; "that no partnership relation ever existed" between the defendants, but that he believes that at the time or times in question the defendant Karl Matheus had a partner named

specific statement of claim, and statutory authority; the is which to file an affidavit of merits for out-of-time appeals; that twenty-two days after the date of the order appealed, i.e., on September 8, 1926, a judgment by default was entered against the defendants for $[illegible]. Yet contrary to the court rule the defendants had failed to file their affidavit of merits; that on September 24, 1926, the (the plaintiff) filed a memorandum affidavit of merits for the defendants; that "he thought he was filing the form within the time allowed (?) to judge by the court," and that the failure to file the same on or before the 15th day of September, 1926, "was entirely due to his, the petitioner's, mistake, the mistake in any manner by judge or clerk of the Defendants in error." That all attempts resulting of making his mistake of the time (or filing such affidavit "upon the wrong page of his memorandum book;" that he filed same affidavits in good faith, and that because a jury trained had been made in the case "it did not occur to your petitioner to look over the 'minutes,' nor examine the court files either before or at the time of filing such affidavit of merits;" that he was "absent from the city on business during most of the month of October and did not return until a few days after the date of preparing this petition;" later it appears by [illegible], 1926, when one of the defendants into the then a notary was counsel to serve some kind of a paper on the defendants, "whereupon your petitioner examined the court files and learned for the first time that a judgment had been entered, that he was fully satisfied the defendant Earl Stephens was a contributory defaulter "to at least a very substantial part, if not the entire cause of the insanity," and believes Mrs. Earl Stephens has a pecuniary interest in the whole of such judgment; "that to prevent public injustice ever existed between the defendants, but that he believes that at the time or times in question the defendant Earl Stephens had a partner named

Louis Bacheroux, who is liable, and ought to be made a party defendant, if the court should find upon a trial of the cause that any liability attaches to the defendant Karl Matheus.

The amended statement of claim of the plaintiff alleges that the defendants are partners, doing business under the firm name of Majestic Belt Company, and are indebted to the plaintiff in the sum of $608.30, with interest, "for work done and materials furnished," as shown by an itemized statement of account attached thereto, which account debits said Majestic Belt Company with the price of a large number of dies, punches, plates, brackets, etc., aggregating $1200.30, and shows credits of payments in cash and by note and the return of one machine, aggregating $592, leaving a balance due of $608.30, which, with interest, is the amount claimed to be due.

In the petition to vacate there is no denial of any fact alleged in such amended statement of claim except the statement that the defendants are partners. No facts are stated in the petition tending to show that defendants have any other defense of any kind to the plaintiff's claim; and no reason is given in the petition for the failure of defendants to make that defense in apt time, or to make any other defense they may have had, if any, in apt time, except the admitted carelessness of the defendants' attorney in making a note of the required time upon the wrong page of his memorandum book. There is no claim, nor could there well be any such claim, that such carelessness of the defendants' attorney was in any manner caused or induced by the fraud of the plaintiff or his attorney, or by any accident, or by the mistake of any person except the defendants' attorney.

The power and jurisdiction of the Municipal Court to vacate a judgment, where no motion to vacate has been made within thirty days after the judgment was entered, is expressly limited by section 21 of the Municipal Court Act to cases in which a

[illegible] [illegible], who is liable, and ought to be made a party defendant, if the court should find upon a trial of the cause that any liability exists to the defendant [illegible].

The amended statement of claim of the plaintiff alleges that the defendants are partners, doing business under the firm name of Kaplan Bail Bonding, and are licensed to do business in the year of 1964.30, with [illegible], "for work done and moneys loaned," on account by an insurance company of various attorneys, which company issues said bail bonds upon the [illegible] of a large number of [illegible], [illegible], [illegible], etc., aggregating [illegible], and shows credits of payments in cash and by note and the return of one [illegible], aggregating [illegible], leaving a balance due of [illegible], which, with interest, is the amount claimed to be due.

In the petition to recover there is no denial of the fact alleged in such amended statement of claim, except the statement that the defendants are partners. No facts are stated in the petition tending to show that defendants have any other defense of any kind to the plaintiff's claim; and no reason is given in the petition for the failure of defendants to make such defense in apt time, or to make any other defense they may have had, if any, in apt time, except the mutual misunderstanding of the defendants' attorney in making a note of the amount due upon the wrong page of his memorandum book. There is no claim, nor could there well be any such claim, that such carelessness of the defendants' attorney was in any manner caused or induced by the fraud of the plaintiff or his attorney, or by any act, or by the mistake of any person except the defendants' attorney.

The power and jurisdiction of the municipal court of Wichita to grant a judgment, where no motion to vacate has been made within thirty days after the judgment was entered, is expressly limited by section 37 of the municipal court act to cases in which a

petition is thereafter filed "setting forth grounds which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity." The rule in this state is well settled that before a bill in equity can be maintained to set aside a judgment to which there was a good defense at law, known to the defendant at the time it was rendered, "it must clearly appear that the enforcement of the judgment would be unjust and against conscience, and moreover, that the defendant was prevented from making his defense to the action in which the judgment was obtained, by fraud, mistake, accident or surprise, without laches, negligence or default on his part or those representing him." Clark v. Ewing, 93 Ill. 572; Allen v. Smith, 72 Ill. 331; Ward v. Durham, 134 Ill. 195, 202; Telford v. Brinkerhoff, 163 Ill. 439, 444; Kretschmar v. Ruprecht, 230 Ill.492, 494; Am. Surety Co. v. Bliss, 214 Ill. App. 463, 466. In Applying this rule the negligence of the attorney is treated as the negligence of the party whom he represents, unless special circumstances are shown in the conduct of such attorney amounting to fraud upon the client, which results in the entry of the judgment. Bardonski v. Bardonski, 144 Ill. 284; Kern v. Strausberger, 71 Ill. 413; Clark v. Ewing, supra. No such special circumstances are shown in this case, and therefore the defendants are chargeable in this case with the admitted negligence of their attorney. It follows that the petition to vacate the judgment did not show upon its face grounds which would be sufficient to cause the judgment to be set aside in a court of equity, and therefore was not sufficient to authorize the Municipal Court to vacate the judgment.

For the reasons stated, the order of the Municipal Court vacating the judgment against defendants is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

petition is therefore this: Having first [illegible] that be sufficient to show the case to be material, we judge it modified by a full in evidence. The rule is that it should be not matter that before a bill is ready for [illegible] to be made a judgment be which have not a good defense, it is, upon to the defendant at the time of the rendering, "it must clearly appear that the enforcement of the judgment would be unjust and against conscience, and equity." This the defendant was prevented from making the defense by the action in which the judgment was obtained, by fraud, or accident, unmixed or mistake, without laches, negligence or default on his part or some reasonable cause. Clark v. Lewis, 32 III. 342; Allen v. Mills, 74 III. 227; Ward v. Brown, 114 III. 193, 197; Fairbanks v. Blackwell, 165 III. 450, 444; Frankenhuis v. Quandt, 80 III.App. 492; Jos. Schlitz Co. v. Miles, 114 III. App. 481, 486. In applying this rule the negligence of the attorney is treated as the negligence of the party when in proceedings, which involve strangers, are shown in the contest of such attorney involving to fraud upon the client, which results in the entry of the judgment. Hancock v. Fairbanks, 114 III. 394; Lynn v. Chamberlin, 71 III. 544; Ward v. Brown, supra. So such special circumstances are shown in this case, and therefore the defendants are entitled in any case to the admitted negligence of their attorney. It follows also that to grant to vacate the judgment (if not upon such the few grounds which would be sufficient to cause the judgment to be set aside in a court of equity, and therefore not sufficient to authorize the Municipal Court to vacate the judgment.

For the reasons above, the order of the Municipal Court vacating the judgment complained of should be reversed.

Reversed.

Gridley, J., and Barnes, J., concur.

(3553a)

28634
18 - 28634

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HELEN WILSON,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

232 I.A. 628

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Defendant was convicted in the Municipal Court of being an inmate of a house of prostitution and sentenced to ninety days imprisonment in the house of correction. The case was tried by the court on a plea of not guilty, a jury trial being waived. The defendant was present but does not appear to have been represented by counsel. No bill of exceptions nor stenographic report appears in the record, but there is a "statement of facts," signed by the trial judge, setting forth in narrative form the substance of the testimony of each witness, and stating that the case was tried "jointly" with the cases of two other persons who were arrested with the defendant at the same time and in the same place. No objections are shown to have been made at any time to any action or ruling of the court. In fact, no ruling of the court upon any question is shown in the statement of facts.

Three witnesses testified on behalf of the People, one a policeman, and the other two, private investigators. Their testimony is to the effect that defendant was a known prostitute and conducted a house of prostitution; that she had promised the police to remove from the premises where her business was conducted, but had failed to keep her promise; that at the time stated in the information a police officer

THE KOWLOON DOCK COMPANY LIMITED,
Defendants in error,

vs.

JOHN WILSON,
Plaintiff in error.

FROM THE
SUPREME COURT
OF HONG KONG.

Mr. Justice Fitzgibbon delivered the judgment of the Court.

Difficulties are encountered in the jurisprudential theory of taking an inventory of a bundle of prejudices and overcomes to minority lays inconvenient in the house of deliberation. The case was tried by the court on a plea of not guilty, a jury trial being waived. The defendant was charged but does not appear to have been represented by counsel. No bill of exceptions nor stenographic report appears in the record, but there is a "statement of facts," signed by the trial judge, setting forth in narrative form the substance of the testimony of each witness, and showing that the case was tried "jointly" with the cases of two other prisoners who were arrested with the defendant at the same time and in the same place. No objections are shown to have been made at any time to any motion or ruling of the court. In fact, no ruling of the court upon any question is shown in the statement of facts.

Three witnesses testified on behalf of the Crown, one a policeman, and the other two, private investigators. Their testimony is to the effect that defendant and a number associates had commenced a house of prostitution; that the had provoked the public to resort from the premises more than business was conducted, but had failed to keep her premises; that at the time stated in the information a police officer

entered the premises and found a man named Russian in a bedroom, talking to a prostitute named Jeffries, who said she was visiting the defendant; whereupon all three were arrested. The man, Russian, testified that on the day of his arrest he was passing by the premises in question and saw defendant sweeping snow from the sidewalk; that defendant said to him "This is an awful job," and the witness then took the broom and swept the sidewalk; whereupon defendant told the witness to go upstairs, which he did and there met the Jeffries woman in a bedroom, and while talking to her there the police appeared and arrested them. The defendant testified in her own behalf that she "had sold out the place and was to move the next day," and that she so informed the police officer.

Defendant's counsel contends that this evidence shows that the defendant was a keeper of a house of ill-fame, but does not show that she was an inmate thereof. This contention overlooks or ignores that part of the evidence which is to the effect that defendant was a prostitute and lived in a place where - as one witness testified - "Helen Wilson and others conducted a house of prostitution." An "inmate" is defined to be "one who is a mate or associate in the occupancy of a place." (Century Dictionary; Ex parte Paimoules, 222 Fed. 118.) The evidence brought defendant within this definition and was sufficient, prima facie, to sustain the charge; and the evidence was uncontradicted. The evidence may also show that she was the keeper, or one of the keepers, of the house; but that fact, if true, is no defense to the charge in this case. The same act, or group of acts, may constitute two or more distinct offenses, and the offender may be prosecuted for each offense. (16 Corpus Juris 58; Nagel v. The People, 229 Ill. 598; People v. Hall, 242 Ill. 284.) There is no merger of one offense in the other, for both are misdemeanors. (Graff v. The People, 208 Ill. 312;

chap. 38, R. S., secs. 57 and 57a-1.)

It is next claimed that the "judgment does not find defendant guilty of violating any law of this state." This claim seems to be predicated upon the fact that the court found the defendant "guilty in manner and form as charged in the information," and the information describes the statute alleged to be violated as "Section 57 A,1, Chap. 38, R.S.," which words, counsel says, do not describe any law of Illinois. It is also claimed that if these abbreviations mean a section of the Criminal Code of Illinois, then the proper description of that section should have been "Section 57 A,1, as Amended." It is also said that the judgment finds defendant guilty of being an inmate, etc., without saying that such offense is contrary to the statute. These contentions are wholly and in every respect untenable. "Chap. 38, R. S.," mentioned in the information, cannot refer to anything else than chapter 38 of the Revised Statutes of Illinois, especially as it is immediately preceded by mentioning a place in the city of Chicago, Cook County, Illinois. The particular section in question was first enacted in 1915 "to be known as section 57a-1," and though it has been amended, that designation was not changed. (Session Laws of 1915 and 1921.) Neither the defendant nor anyone else could possibly misunderstand or be misled by the references thus made in the information to the statute in question. The recital in the judgment that the defendant is guilty of being an inmate, etc., is based upon the formal finding which precedes it, and adds nothing to such finding. The second recital was needless and, likewise, harmless. The judgment which follows seems to be in proper form.

It is also objected that defendant was tried without having the benefit of counsel, and was tried "jointly" with her associates. It does not appear from anything in the record that the defendant requested the court to appoint counsel for her,

chap. 38, R. S., secs. 37 and 70-1.)

It is next claimed that the "judgment does not find defendant guilty of violating any law of this state." This claim seems to be predicated upon the fact that the court found the defendant "guilty in manner and form as charged in the information," and the information described the statute alleged to be violated as "Section 37 I.L. Chap. 38, R.S.," which words, counsel says, do not describe any law of Illinois. It is further claimed that if these abbreviations mean a section of the criminal code of Illinois, then the proper description of that section should have been "Section 37 C.L., et seq." It is also said that the judgment finds defendant guilty of being an inmate, etc., without saying that such offense is contrary to the statute. These contentions are subtle and in every respect untenable. "Chap. 38, R. S.," mentioned in the information, cannot refer to anything else than chapter 38 of the Revised Statutes of Illinois, especially as it is immediately preceded by mentioning a place in the city of Chicago, Cook County, Illinois. The particular section in question was first enacted in 1911 and has been known as section 70-1, and though it has been amended, that designation was not changed. (Session Laws of 1915 and 1919.) Neither the defendant nor anyone else could possibly misunderstand or be misled by the reference thus made in the information to the statute in question. The recital in the judgment that the defendant is guilty of being an inmate, etc., is based upon the formal finding which preceded it, and made reference to such finding. The second recital was surplusage and, likewise, harmless. The judgment which follows seems to be in proper form.

It is also objected that defendant was tried without having the benefit of counsel, and her trial therefore was invalid. It does not appear from anything in the record that the defendant requested the court to appoint counsel for her.

or stated that she was unable to procure counsel. It is only under such circumstances that the court is charged with the duty of appointing counsel. (Criminal Code, Div. XIII, Sec. 2; Johnson v. Whiteside County, 110 Ill. 22.) The record shows no objection by her at any time to the action of the court in hearing her case with the others, nor does it appear that she was injured in any way by the practice that was followed.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

or stated that he was unable to produce evidence. It is such under such circumstances that the jury is deprived of the duty or opportunity assumed. (Criminal Code, sec. 1033, and, by Johnson v. Dominion Income, 4th 243, 6-1) The learned trial judge was satisfied in his way to the question that was involved.

The judgment of the Saskatchewan Court is affirmed.

Appeal dismissed.

Bridgey, J. J., and Fauvel, J., concur.

(3554)

46 - 28691

MARION CHAVIN,
Appellee,

vs.

GERTRUDE WITTENBERG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

232 I. A. 628

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT

By this appeal the defendant questions the validity of a judgment rendered against her in a suit brought by filing a copy of a distress warrant. There was a trial before the court. At the beginning of the trial, the defendant moved to quash the distress warrant upon the ground that the warrant was defective by reason of alleged omissions, wrong dates and alleged alterations, that no copy of the inventory was served on the defendant, and that possession of defendant's premises was illegally taken under the writ. The court reserved its ruling on the motion until the close of the evidence, and then overruled it and entered a finding and judgment for the plaintiff for the amount of rent due, with a general and special execution.

The distress warrant recites that on January 5, 1923, there was due the plaintiff from defendant the sum of $225 for rent of certain described premises. The lease provides for a monthly rent of $90, payable in advance. The defendant testified that she "paid" the November, 1922, rent with a check which came back marked "Not sufficient funds," that she did not pay the December rent, but paid $45 on January 4, 1923. It appears that after the check given in November had been so returned, the plaintiff's lawyer, without plaintiff's knowledge,

obtained from the defendant a promissory note for $200, signed by the defendant's father and her husband. The lawyer testified that the note was given to him to stop threatened forcible detainer proceedings, that it was never paid, and that he "held" it at the time of the levy of the distress warrant. There is no proof tending to show the note was accepted as payment of rent, and in the absence of an agreement to that effect, the taking of such a note did not extinguish the obligation of defendant to pay the rent reserved in the lease. (Atkins v. Byrnes, 71 Ill. 326, 332.)

Counsel for defendant insist that the court erred in refusing to quash the distress warrant. The lease in evidence does not specifically give the landlord a lien on the tenant's goods for the payment of the rent. In the absence of such a provision in the lease, a landlord in this state has no lien on the tenant's property, but he has a right to distrain for rent due (Powell v. Daily, 163 Ill. 646, 650; Bartlett v. Sullivan, 87 Ill. 219); and when he has done so, he thereby acquires a lien upon the property distrained which is analogous to the lien acquired by the levy of a writ of attachment. (Kellogg Newspaper Co. v. Peterson, 162 Ill. 158,161; Bartlett v. Sullivan, supra; 2 Tiffany, Landlord & Tenant, sec. 320.) In Bartlett v. Sullivan, supra, it is said that since the revision of the statutes in 1874, "a proceeding by a distress warrant must be regarded as a suit for the collection of rent." Section 20 of the Landlord and Tenant Act provides that after filing in the clerk's office a copy of the distress warrant and an inventory of the property levied upon, "the suit shall thereafter proceed in the same manner as in case of attachment," that no declaration need be filed, but "the distress warrant shall stand for a declaration and shall be amendable as other declarations." The next section provides that

obtained from the information a preliminary work for some reason by the defendants failed and has expired. The lower municipalities that the land was given in use to very unfavorable for the taxpayer proceedings, then it was never paid, and that he should it at the time of the levy of the different revenue. There is no proof tending to show the land was assessed in excess of rent, and in the absence of an assessment in this effect, the making of such a proof not relieving the obligations of the tenant to pay the rent reserved in the lease. (Lessee v. Bruce, 73 III. 548, 549.)

Counsel for defendant insist that the court erred in refusing to work the tenant's interest. The lease in evidence does not specifically give the landlord a lien on the tenant's goods for the payment of the rent. In the absence of such a provision in the lease, a landlord in this state has no lien by the tenant's property, but he has a right to distrain for rent due (Lessee v. Cole, 69 III. 548, 549; Sprague v. Dolliver, 67 III. 319); and when it has been so, he thereby creates a lien upon the property existing when it is replevied or the lien secured by the levy of a writ of attachment. (Lessee Insurance Co. v. Peterson, 182 III. 197; Sprague v. Dolliver, supra; Tiffany, Landlord & Tenant, sec. 320.) In Sprague v. Dolliver, supra, it is said that since the revision of the statutes in 1874, "a proceeding by a distress warrant may be regarded as a mode for the enforcement of rent." Counsel in of the landlord and tenant act provides that after filing in the clerk's office a copy of the distress warrant and an affidavit of the property levied upon, "the sole should thereafter proceed in the same manner as in case of attachment." Such is decidedly not the fact, but "the distress warrant would stand for a declaration and should be amended as other declarations." The most notice provides that

the defendant may avail himself of any defense that would have been proper in a suit for rent. (Cahill's Statutes, chap. 80, secs. 20 and 21.)

A distress warrant is an authority given by a landlord to another person to act as the landlord's bailiff in making the distress. Its primary purpose is to protect the bailiff in seizing and holding the chattels of the tenant. No precise form is required, but it is sufficient if it shows the amount of the landlord's claim for rent, and that the landlord thereby purports to authorize the person to whom the warrant is directed to distrain the tenant's property for such rent. (3 Tiffany, Landlord & Tenant, sec. 335.)

The copy of the distress warrant which was filed in this case contains these essential requirements. Counsel in the trial court claimed that the copy, as originally filed, showed that one of the dates in the distress warrant was January, 1922, instead of 1923. The context shows that 1923 was intended and the trial court very properly allowed it to be amended on the trial. Counsel also claimed the writ was altered by inserting the name of the bailiff after it was signed. There is some evidence tending to prove that such was the fact, but not enough, in our opinion, to overcome the positive evidence to the contrary. It was further objected that while the return on the warrant states that a copy was served on the defendant, such was not the fact. The evidence shows that the plaintiff's agent handed a copy of the warrant to the defendant's attorney in defendant's presence; but the copy so served did not contain the agent's name and contained no inventory of the goods seized. There is nothing in the statute requiring a copy of the warrant and inventory to be served on the tenant. The statute requires that a copy of the distress

the defendant may avoid liability by any defense that would have been proper in a suit for rent. (Smith's Contracts, supra, at 8088, 90 and 91.)

A tenancy matter is an equitable claim by a landlord to one's person or use of or the landlord's ability to enjoin the claimant. The primary purpose of a lease is the ability to relate and holding the rights of the tenant. An private case is regular, but it is sufficient if it shows the manner of the landlord's claim for rent, and that the landlord cannot be authorize the person to whom he would be obligated to attain the landlord's property for said rent. (2 Tiffany, Landlord & Tenant, sec. 328.)

The main of the factual matters which are tried in this case contains three essential requirements. Counsel in the trial court claims that the main, or ultimately trial, showed that one of the duties in the landlord-tenant case Demurrer, Motion, Answer of 1900. The property there, not the landlord and the total amount truly reasonably allowed it to be recorded as the trial. Counsel also claims the rent was claimed by landlord the main of the matter where it was claimed. There is more evidence that is proof that could not the fact, the lease example, is not opinion, to overcome the positive evidence in the contrary. It was therefore adjudged that with the motion of the landlord-tenant Not a copy was served on the defendant, and not the fact. The evidence does not the plaintiff's counsel number of the property in the defendant's tenancy is reasonably necessary, but the judge in argued his not matter the opinion's been not tenant as the judge of the good actions. There is no claim of the statute requirement a copy of the notice and landlord to be served on the tenant. The statute requires that a copy of the instrument

warrant together with an inventory shall be filed in the clerk's office, and that thereupon a summons shall issue, which shall be served upon the tenant. That was done in this case. So far as this case is concerned, the question whether the copy of the distress warrant that was handed to defendant's lawyer complies with the provisions of chap. 52, Revised Statutes, relating to exemptions, is wholly immaterial.

It is finally claimed that the distress warrant is of no effect because no copy of it was filed "immediately" in the clerk's office. The warrant was served on January 11, 1923, and the copy was filed on January 16, 1923. There is uncontradicted evidence to the effect that the delay was caused by defendant's requests for further time to pay. She cannot now be heard to complain that plaintiff acceded to her request. There is no evidence that her rights were prejudiced in any manner by the delay.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

our next together with an inventory shall be filed in the clerk's office, and that thereupon a mandate shall issue. Order shall be entered upon the docket. This the 20th day. So far as this case is concerned, the question whether the duty of the clerkship extent this not bound to a fiduciary duty complies with the provisions of law, Revised Statutes, relating to fiduciaries, is doubtful.

It is finally claimed that the fiscal account is of no effect because no copy of it was filed "immediately in the clerk's office. The account was taken on January 21, 1909, but the copy was filed on January 23, 1909. There is nothing in evidence to the effect that the delay was caused by intestate's reasons for further time to pay. The record has to have a complaint that plaintiff acted in bad faith. There is no evidence that her rights were prejudiced in any manner by the delay.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

Crawley, C. J., and Bartram, J., concur.

(3525a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois,

Defendant in error,

vs.

Eugene Perry,

Plaintiff in error,

Error to the County Court of Boone County

Partlow, P.J.

The plaintiff in error, Eugene Perry, was found guilty by a jury in the county court of Boone county under an information charging wife abandonment, and was fined $100 and ordered to pay his wife $25 per month for one year. To review the judgment, a writ of error has been prosecuted from this court.

The reasons urged for a reversal ofthe judgment are that the court improperly permitted the information to be amended; erroneously ruled on the admission and exclusion of evidence; gave erroneous instructions and refused proper ones; and that the judgment is contrary to the evidence. We do not deem it necessary to consider each of these errors. In fact some of them are not properly before us. For example, as the first one, namely, that the court improperly permitted the information to be amended, neither the original nor the amended information appears in the abstract. The abstract is not in compliance with rule 16 of this court. The error as assigned is not properly preserved and plaintiff in error is in no position to urge it. We think the consideration of the last error will be sufficient to dispose of the case.

The evidence shows that the plaintiff in error and his wife were married in January, 1921, and resided on Second Street in the City of Belvidere. He was twenty three years old and she was twenty. He was employed by the Chicago and Northwestern Railway Company as a clerk and later as a fireman. On the evening of May 10, 1922, while the plaintiff in error was at work his wife left their home about eight o'clock in the evening and went in an automobile to Beloit, Wisconsin. It is admitted that Harold Spaulding and

The people of the State of Illinois,

Defendant in error,

vs.

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Miss Smith were with her, and there is evidence strongly tending to show that two other men were with them, Tuck Turner and Stanley Glass, and that on the trip to Beloit Mrs. Perry sat in the back seat with Turner and on the return trip she sat in the rear seat with Glass. They arrived at Beloit about nin o'clock in the evening and went to Waverly Beach, a dancing pavilion, where they remained until about 11:15 o'clock. Mrs. Perry danced most of the dances with Glass. There is evidence tending to show that she and Turner were away twenty minutes or a half hour. The party left the dance hall about eleven o'clock and went to a restaurant. They then started to Belvidere, where they arrived about 12:30. Mrs. Perry went to her home and found no one there and then went to the home of her parents. Mrs. Perry testified there was no improper conduct on her part on this occasion. The evidence shows that on this evening plaintiff in error returned home from work about eight o'clock. He found his wife gone. He went to the home of her parents and made inquiries and searched for her but could not find her. He and her father returned to the home on Second Street where they remained until about midnight. She did not return and he went to the home of his parents where he remained for the rest of the night. He saw his wife next morning and had a conversation with her. At first she denied she had been to Beloit, but afterwards admitted she had made the trip. They separated at that time and on May 19 the plaintiff in error had a talk with his wife in which he told her they would live together if she would promise to stay off the streets and behave herself, and he testified she replied he could go to hell, she would not do that for any man. He testified he told her he would give her until the last of the month to make up her mind what she wanted to do. On May 29, with the consent of the wife, the furniture was sold for $400, and $225 of this amount was given to the wife. She admits that after the separation he gave her $200 and various small sums ranging from $2 to $5. Four apparently disinterested witnesses testified that Mrs. Perry had gone to dances with other men. Men, on various occasions, called at her house while her husband was at work. The

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blinds had been drawn and she had gone upstairs with some of these men. She had gone automobile riding with men other than her husband, and on one occasion went to a dense woods with Tuck Turner. Mrs. Perry denied all improper conduct and was corroborated to a certain extent by her father and mother. Some evidence was offered tending to show condonation by the plaintiff in error.

Section 2, chapter 38, division 1, of the statute under which this information was filed provides that every person who shall, without any reasonable cause, neglect or refuse to provide for the support or maintenance of his wife, said wife being in destitute or in necessitous circumstances, shall be guilty of a misdemeanor. The question is whether plaintiff in error, without any reasonable cause, neglected or refused to provide for his wife. In a criminal prosecution of a husband for neglecting to provide for his wife, the burden of proof resting upon the People to establish the offense, is not satisfied without proof that the neglect was "without cause", as such words of the statute constitute an essential part of the offense. People v. Goldsand, 207 Ill. App. 372; People v. Parks, 216 Ill. App. 529. A wife cannot conduct herself in a highly improper manner and then invoke the aid of the statute to compel her husband to support her. If her conduct is such as to give her husband reasonable cause to refuse to support her, he will not be held responsible criminally. The evidence shows that the wife was guilty of such conduct as gave the plaintiff in error reasonable ground for leaving her, this conduct was not condoned by the plaintiff in error, and for that reason the verdict of the jury is contrary to the evidence and cannot be sustained.

We do not deem it necessary to consider any of the other errors assigned, and the judgment will be reversed and the cause remanded.

Reversed and remanded.

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We do not deem it necessary to consider any of the other errors assigned, and the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson

Clerk of the Appellate Court.

(3526a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 7 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

H. M. Mueller,

Plaintiff in error,

vs.

John Rauhut,

Defendant in error,

Error to the Circuit Court of Boone County

Partlow, P.J.

The plaintiff in error, H. F. Mueller, began suit in the circuit court of Boone county against the defendant in error, John Rauhut, to recover $821.10 alleged to be due as commission for the sale of real estate. There was a trial by jury, verdict for the defendant in error, and a writ of error has been prosecuted from this court to review the judgment. Pending the hearing in this court, the defendant in error died, and his personal representative has been substituted in his place.

The principal question is whether or not the plaintiff in error was employed to make the sale and whether he is entitled to a commission for making it. The evidence shows that the defendant in error was the owner of 119 acres of land located three and one half miles southwest of Hebron in McHenry county. He had lived on this land eight or nine years, and about a year prior to the transaction in question had placed it in the hands of Dan Quinlan of Woodstock, for sale, but no sale had been made. The plaintiff in error runs a clothing and gents furnishing store in Hebron. He testified that about July 25, 1916, the defendant in error came into his store and said he had just returned from Woodstock, and that Quinlan had not sold his farm. He said to the plaintiff in error that a good many people came into the store, and he asked the plaintiff in error if he did not think he could find a buyer for the farm. The plaintiff in error replied that he thought he could. As a result of this conversation, plaintiff in error contends that it was agreed that plaintiff in error should sell the farm at $140.00 an acre, and defendant in error should pay him six per cent commission for the

H. M. Mueller,

Plaintiff in error,

vs.

John Hawkins,

Defendant in error,

Error to the circuit court of Boone County

Hartlow, J.:

The plaintiff in error, H. F. Mueller, began suit in the circuit court of Boone county against the defendant in error, John Hawkins, to recover $821.10 alleged to be due as commission for the sale of real estate. There was a trial by jury, verdict for the defendant in error, and a writ of error has been prosecuted from this court to review the judgment. Pending the hearing in this court, the defendant in error died, and his personal representative has been substituted in his place.

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sale. This conversation and alleged contract are disputed by the defendant in error, and he testified that the plaintiff in error asked him if his farm was for sale and he told him it was for sale at $140.00 per acre; that there was no agency entered into and no commission is due.

The plaintiff in error claims that he ~~stpck~~ spoke to two men about buying the farm. One was a man by the name of Olson, and the other was Henry J. Dreblow, who lived on an adjoining farm to the one in question. On August 7, 1916, Dreblow went to the farm and had a talk with the defendant in error. There were certain negotiations which finally resulted in a contract of sale for $13,685.00. Dreblow testified he learned from plaintiff in error that the farm was for sale, and informed defendant in error he first learned of the farm from the plaintiff in error. A short time after the papers were executed, the plaintiff in error met the defendant in error and had a conversation relative to the commission, and the defendant in error said that before the plaintiff in error would receive a commission he must show the defendant in error that he was an agent for the sale. After the sale the defendant in error lived in the immediate neighborhood for several months. He then went to Colorado on a business enterprise in which the plaintiff in error was interested and stayed about three months. He returned to McHenry county, where he lived for about six months, then moved to Belvidere, in Boone county. Nothing further was said about the commission until October 31, 1919, when this suit was commenced.

It is not necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears that the purchaser was induced to apply to the owner through the instrumentality of the broker, or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him. The salesman is entitled to his commission where he is the procuring and efficient cause of bringing about the sale notwithstanding the fact that the same was

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It is not necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears that the purchaser was induced to apply to the owner through the instrumentality of the broker, or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him. The salesman is entitled to his commission where he is the procuring and efficient cause of bringing about the sale notwithstanding the fact that the same was

not actually concluded by him. Hefner v. Herron, 165 Ill. 242; Rigdon v. More, 226 Ill. 382; Pridemore v. Wilson, 159 Ill. App. 343; Friedland v. Isenstin, 191 Ill. App. 109.

The burden of proof was upon the plaintiff in error, not only to prove that he was the agent for the sale, but that he was entitled to his commission. As far as the question of agency was concerned, the plaintiff in error testified one way and the defendant in error testified the other. It therefore became a question of fact for the jury to determine which party was telling the truth and they were in a better position than we are to properly determine that question. A strong controlling fact was that the plaintiff in error made no effort to enforce this claim for three years after it was due. It is difficult to understand why he would wait so long before asserting his rights, especially if $821.00 was due him. This fact probably had much to do with the verdict of the jury. We are not at liberty to reverse the judgment unless we can say that the judgment is clearly and manifestly against the weight of the evidence. We are unable to say that this is true, and for that reason do not feel justified in reversing the judgment on account of the fact that it is against the weight of the evidence.

Complaint is made of the third instruction given on behalf of the defendant in error. This instruction is quite lengthy and attempts to tell the jury under what circumstances the plaintiff in error would be entitled to recover. The objection to it is that it is not based upon the evidence, and that it in effect tells the jury that even if they believe from the evidence that the plaintiff in error did make an effort to sell the farm, and even if it was sold through his effort, and even if he was the procuring cause, he cannot recover for the reason that he did not introduce the seller and the purchaser and was not present when the sale was completed. It is contended that this instruction is contrary to the rule announced in Hefner v. Herron, 165 Ill. 242. We have examined this instruction and read it in connection with the other instructions given in

not actually concluded by him. Hefner v. Herron, 165 Ill. 242; Higdon v. More, 226 Ill. 382; Friebertshauser v. Wilson, 159 Ill. App. 242; Friedland v. Isenstein, 191 Ill. App. 109.

The burden of proof was upon the plaintiff in error, not only to prove that he was the agent for the sale, but that he was entitled to his commission. As far as the question of agency was concerned, the plaintiff in error testified one way and the defendant in error testified the other. It therefore became a question of fact for the jury to determine which party was telling the truth and they were in a better position than we are to properly determine that question. A strong controlling fact was that the plaintiff in error made no effort to enforce this claim for three years after it was due. It is difficult to understand why he would wait so long before asserting his rights, especially if $821.00 was due him. This fact probably had much to do with the verdict of the jury. We are not at liberty to reverse the judgment unless we can say that the judgment is clearly and manifestly against the weight of the evidence. We are unable to say that this is true, and for that reason do not feel justified in reversing the judgment on account of the fact that it is against the weight of the evidence.

Complaint is made of the third instruction given on behalf of the defendant in error. This instruction is quite lengthy and attempts to tell the jury under what circumstances the plaintiff in error would be entitled to recover. The objection to it is that it is not based upon the evidence, and that it in effect tells the jury that even if they believe from the evidence that the plaintiff in error did make an effort to sell the farm, and even if it was sold through his effort, and even if he was the procuring cause, he cannot recover for the reason that he did not introduce the seller and the purchaser and was not present when the sale was completed. It is contended that this instruction is contrary to the rule announced in Hefner v. Herron, 165 Ill. 242. We have examined this instruction and read it in connection with the other instructions given in

the case. We do not think it is in violation of the rule announced in the Hefner case, or is capable of the interpretation placed upon it by the plaintiff in error. It was an instruction which set out the defendant in error's view of the case, and we think it was clearly within the rules of law applicable to the facts in the evidence.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

the case. We do not think it is in violation of the rule announced in the Hefner case, or is capable of the interpretation placed upon it by the plaintiff in error. It was an instruction which set out the defendant in error's view of the case, and we think it was clearly within the rules of law applicable to the facts in the evidence.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L Johnson

Clerk of the Appellate Court.

(3527a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 629

BE IT REMEMBERED, that afterwards, to-wit: On JAN 7 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7256

People of the State of Illinois,

Defendant in error,

vs.

Clare Holman,

Plaintiff in error,

Error to the Circuit Court of Carroll County

232 I.A. 629

Partlow, P.J.

The plaintiff in error and his nephew, Albert Holman, were indicted in the circuit court of Carroll county for owning and operating a still. Albert Holman pleaded guilty and was sentenced. Upon the trial of plaintiff in error Albert Holman testified as a witness and assumed all responsibility for the still. The jury found plaintiff in error guilty and he prosecuted a writ of error from this court where the judgment was reversed because of erroneous instructions. When the case was called for trial the second time, Albert Holman could not be found and plaintiff in error offered a transcript of the evidence of Albert Holman given on the first trial. The court refused to admit this evidence, the plaintiff in error was found guilty and a writ of error has been prosecuted from this court to review the judgment.

The only error assigned is that the court improperly refused to admit the record of the evidence of Albert Holman. A great many authorities have been submitted to us upon this question especially by counsel for plaintiff in error. There is a conflict among the various jurisdictions regarding the rule applicable to testimony of this character. Courts of last resort in many jurisdictions have held that such evidence is admissible, but there is no doubt as to the rule in Illinois. It has uniformly been held that such evidence is not admissible. Bergen v. People, 17 Ill. 426; Brown v. People, 145 Ill. App. 263; People v. Paisley, 220 Ill. App. 460. Counsel for plaintiff in error insist that Illinois is out of line with the great weight of authority on this question and that the rule should be changed. We are not at liberty to change the rule even if we

People of the State of Illinois,

Defendant in error,

vs.

Clare Holman,

Plaintiff in error.

Error to the Circuit Court

of Carroll County

2321 A. 529

Partlow, J.:

The plaintiff in error and his nephew, Albert Holman, were indicted in the circuit court of Carroll county for owning and operating a still. Albert Holman pleaded guilty and was sentenced. Upon the trial of plaintiff in error Albert Holman testified as a witness and assumed all responsibility for the still. The jury found plaintiff in error guilty and he prosecuted a writ of error from this court where the judgment was reversed because of erroneous instructions. When the case was called for trial the second time, Albert Holman could not be found and plaintiff in error offered a transcript of the evidence of Albert Holman given on the first trial. The court refused to admit this evidence, the plaintiff in error was found guilty and a writ of error has been prosecuted from this court to review the judgment.

The only error assigned is that the court improperly refused to admit the record of the evidence of Albert Holman. A great mass authorities have been submitted to us upon this question especially by counsel for plaintiff in error. There is a conflict among the various jurisdictions regarding the rule applicable to testimony of this character. Courts of last resort in many jurisdictions have held that such evidence is admissible, but there is no doubt as to the rule in Illinois. It has uniformly been held that such evidence is not admissible. Bergen v. People, 17 Ill. 426; Brown v. People, 145 Ill. App. 263; People v. Bailey, 220 Ill. App. 460. Counsel for plaintiff in error insist that Illinois is out of line with the great weight of authority on this question and that the rule should be changed. We are not at liberty to change the rule even if we

desired so to do.

The trial court properly excluded the evidence and the judgment will be affirmed.

Judgment affirmed.

desired so to do.

The trial court properly excluded the evidence and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3528a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 639

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

George Sayer,

appellant,

vs. Appeal from the County Court

Fred Schmidt, of Mc Henry County

appellee,

Partlow, P.J.

The briefs, arguments and abstract show that this is an appeal from the circuit court of McHenry county, while the record and certificate of evidence show that the appeal is from the county court of that county. Appellant, George Sayer, began an action of assumpsit against the appellee, Fred Schmidt, to recover $250.00 alleged to be due as rent for an ice house. Appellee filed the general issue and two special pleas of set off. The jury returned a verdict in favor of the appellee for $65.00 under his plea of set off, and this appeal was prosecuted.

Appellant during the season of 1918 and 1919 rented his ice house to the appellee for $500.00 and in addition thereto the appellee was to furnish ice during the summer for a foreman of appellant. The rent was paid and the ice was furnished. During the season of 1919 and 1920, the ice house was rented to the appellee upon the same terms as the previous season. There was no ice harvested during that winter and the house remained vacant and for that reason the appellant remitted the rent due from appellee. During the season of 1920 and 1921, according to the evidence of appellant, he again rented the premises to the appellee, who was to pay $250, furnish ice for the foreman, and appellant was to furnish the lumber to make certain repairs on the building and appellee was to perform the labor. This last part of the agreement was complied with. Appellee's version of the agreement was that he was to pay $250 for the use of the building provided he could put up good ice that was 12 to 14 inches thick. If he could put up this ice he was to furnish ice for the foreman and

George Sayer,

appellant,

vs. Appeal from the County Court

Fred Schmidt, of McHenry County,

appellee.

Partlow, P.J.

The briefs, arguments and abstract show that this is an appeal from the circuit court of McHenry county, while the record and certificate of evidence show that the appeal is from the county court of that county. Appellant, George Sayer, began an action of assumpsit against the appellee, Fred Schmidt, to recover $500.00 alleged to be due as rent for an ice house. Appellee filed the general issue and two special pleas or set off. The jury returned a verdict in favor of the appellee for $55.00 under his plea of set off, and this appeal was prosecuted.

Appellant during the season of 1918 and 1919 rented his ice house to the appellee for $500.00 and in addition thereto the appellee was to furnish ice during the summer for a freezer of appellant. The rent was paid and the ice was furnished. During the season of 1919 and 1920, the ice house was rented to the appellee upon the same terms as the previous season. There was no ice harvested during that winter and the house remained vacant and for that reason the appellant remitted the rent due from appellee. During the season of 1920 and 1921, according to the evidence of appellant, he again rented the premises to the appellee, who was to pay $500, furnish ice for the freezer, and appellant was to furnish the lumber to make certain repairs on the building and appellee was to perform the labor. This last part of the agreement was complied with. Appellee's version of the agreement was that he was to pay $250 for the use of the building provided he could put up good ice that was 12 to 14 inches thick. If he could put up this ice he was to furnish ice for the freezer and

was to make the repairs to the ice house with the lumber furnished by the appellant. During the winter the ice was only 7 inches thick, but appellee started to harvest it. He plowed the ice and was about ready to put it into the house when the weather got bad and it commenced to rain, and after that time there was no opportunity during the remainder of the season to fill the house. During the next summer the appellee furnished $65.00 worth of ice to the foreman of appellant. Appellant brought suit for his rent. Appellee filed a set off for the ice furnished, and the jury found the issues for the appellee.

The only ground for reversal urged is that the evidence does not sustain the judgment. Three witnesses testified in the case, appellee, appellant and his foreman, Blake. The terms of the contract are to be determined, however, from the evidence of appellant and appellee. Their testimony is in direct conflict and there is no way in which it can be harmonized. The question as to what were the terms of the contract was purely a question of fact for the jury. The only ground upon which a court of review would be warranted in reversing the judgment would be that the judgment is clearly and manifestly against the weight of the evidence. The mere fact that the evidence is in conflict does not justify a reversal. Eggman v. Nutter, 169 Ill. App. 116; Hart v. Wilson 177 Ill. App. 510; Grapperhaus v. Taylor, 195 Ill. App. 165. The most that can be said of the evidence is that it is in conflict.

We cannot say that the verdict is contrary to the evidence, or against the weight of the evidence, and for this reason it is our duty to affirm the judgment.

Judgment affirmed.

was to make the repairs to the ice house with the lumber furnished by the appellant. During the winter the ice was only 7 inches thick, but appellee started to harvest it. He placed the ice and was about ready to put it into the house when the weather got hot and it commenced to rain, and after that time there was no opportunity during the remainder of the season to fill the house. During the next summer the appellee furnished $55.00 worth of ice to the foreman of appellant. Appellant brought suit for his rent. Appellee filed a set off for the ice furnished, and the jury found the issues for the appellee.

The only ground for reversal urged is that the evidence does not sustain the judgment. Three witnesses testified in the case, appellee, appellant and his foreman, Kane. The terms of the contract are to be determined, however, from the evidence of appellant and appellee. Their testimony is in direct conflict and there is no way in which it can be harmonized. The question as to what were the terms of the contract was merely a question of fact for the jury. The only ground upon which a court of review would be warranted in reversing the judgment would be that the judgment is clearly and manifestly against the weight of the evidence. The mere fact that the evidence is in conflict does not justify a reversal. Eggman v. Butler, 165 Ill. App. 115; Hart v. Wilson 177 Ill. App. 510; Grapperhaus v. Taylor, 195 Ill. App. 165. The most that can be said of the evidence in this it is in conflict.

We cannot say that the verdict is contrary to the evidence, or against the weight of the evidence, and for this reason it is our duty to affirm the judgment.

Judgment affirmed.

STATE OF ILLINOIS. } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

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thick, but appellee started to harvest it. He plowed the ice and
was about ready to put it into the house when the weather got bad
and it commenced to rain, and after that time there was no oppor-
tunity during the remainder of the season to fill the house. Dur-
ing the next summer the appellee furnished $55.00 worth of ice
to the foreman of appellant. Appellant brought suit for his rent.
Appellee filed a set off for the ice furnished, and the jury found
the issues for the appellee.

The only ground for reversal urged is that the evidence does
not sustain the judgment. Three witnesses testified in the case,
appellee, appellant and his foreman, Blake. The terms of the
contract are to be determined, however, from the evidence of
appellant and appellee. Their testimony is in direct conflict and
there is no way in which it can be harmonized. The question as to
what were the terms of the contract was purely a question of fact
for the jury. The only ground upon which a court of review would
be warranted in reversing the judgment would be that the judgment
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reversal. Eggman v. Butler, 169 Ill. App. 116; Hart v. Wilson
177 Ill. App. 510; Grapperhaus v. Taylor, 195 Ill. App. 165. The
most that can be said of the evidence is that it is in conflict.

We cannot say that the verdict is contrary to the evidence,
or against the weight of the evidence, and for this reason it is
our duty to affirm the judgment.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3529a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 629

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Florence Isenberger,

appellant,

vs.

Scott Myers,

appellee,

Appeal from the County Court of Carroll County.

Partlow, P.J.

On June 4, 1923, appellee, Scott Myers, obtained a judgment in the circuit court of Carroll county against W. P. Stattler, and on June 19, 1923, an execution was levied on a Studebaker automobile alleged to belong to Stattler. Henry Isenberger served notice under the statute that he was the owner of the automobile. Subsequently, by agreement, appellant, Florence Isenberger, a daughter of Henry Isenberger, was substituted in the notice of claim of ownership. There was a trial of the rights of property before a jury in the county court, and a verdict was returned finding that appellant was not the owner of the automobile. An appeal has been prosecuted to this court.

The first error urged is that the judgment is not sustained by the evidence. The evidence shows that W. P. Stattler is a veterinary surgeon at Lanark, Illinois. He was the owner of a Dodge truck. Prior to May 26, 1923, he entered into negotiations with Wagner & Son, automobile agents of Savanna, Illinois, to trade the truck in on a new automobile, and it was agreed that he should be allowed $400.00 credit for the truck. On May 26, 1923, the trade was consummated for $1415.00. Stattler got the Studebaker car in question. He received $400.00 credit for the Dodge truck, paid $300.00 in cash, and executed a chattel mortgage for $715.00, payable in monthly installments. This chattel mortgage was filed for record on May 28. The balance due on this chattel mortgage was paid by Stattler on June 2, but the mortgage was not released. Stattler testified he made arrangements with Henry Isenberger to buy this car as a graduating present for his daughter, the appellant. Henry Isenberger

Florence Isenberger,

appellant,

vs.

Scott Myers,

appellee,

Appeal from the County Court of Carroll County.

Partlow, P.J.

On June 4, 1923, appellee, Scott Myers, obtained a judgment in the circuit court of Carroll county against S. F. Stattler, and on June 19, 1923, an execution was levied on a Studebaker automobile alleged to belong to Stattler. Henry Isenberger served notice under the statute that he was the owner of the automobile. Subsequently, by agreement, appellant, Florence Isenberger, a daughter of Henry Isenberger, was substituted in the notice of claim of ownership. There was a trial of the rights of property before a jury in the county court, and a verdict was returned finding that appellant was not the owner of the automobile. An appeal has been presented to this court.

The first error urged is that the judgment is not sustained by the evidence. The evidence shows that S. F. Stattler is a veterinary surgeon at Lanark, Illinois. He was the owner of a Dodge truck. Prior to May 26, 1923, he entered into negotiations with Werner Son, automobile agents of Savanna, Illinois, to trade the truck in on a new automobile, and it was agreed that he should be allowed $400.00 credit for the truck. On May 26, 1923, the trade was consummated for $1415.00. Stattler got the Studebaker car in question. He received $400.00 credit for the Dodge truck, paid $300.00 in cash, and executed a chattel mortgage for $715.00, payable in monthly installments. This chattel mortgage was filed for record on May 28. The balance due on this chattel mortgage was paid by Stattler on June 2, but the mortgage was not released. Stattler testified he made arrangements with Henry Isenberger to buy this car as a graduating present for his daughter, the appellant. Henry Isenberger

testified he paid for the car himself. That on May 26, the date the car was bought, he cancelled a $300.00 book account, paid $400.00 in cash, and on June 2, gave Stattler his note for $715.00 due in one year. On May 31, 1923, appellant made a sworn application to the Secretary of State for a license for the car and the same was issued to her. On June 19, 1923, the sheriff found the car in the custody of the appellant and asked her whether she owned it stating that he was the sheriff and proposed to levy an execution on the car as the property of Stattler. This conversation took place in the streets of Lanark in front of the place of business of Stattler. In response to the inquiry of the sheriff, appellant said the car was not hers, and indicated by a nod of her head that it was owned by Stattler.

The question is whether this evidence was sufficient to justify the jury in returning a verdict finding that the appellant was not the owner of the car. It is conceded that when the car was originally bought the $400.00 truck of Stattler was credited upon the purchase price. Stattler paid $300.00 in cash, according to his own testimony and executed a mortgage for $715.00. It is claimed that these papers were originally made out in the name of appellant, but for some reason were changed and Stattler's name was substituted. If Stattler was not the owner of the car, it is difficult to understand how he could execute a chattel mortgage to secure the balance of the purchase price, and how that chattel mortgage could be accepted by Wagner & Son as a part of the purchase price. Section 7, chapter 95, of the statute provides that where a chattel mortgage is executed upon personal property, during the existence of the lien, the mortgagor shall not sell the property without the written consent of the mortgagee, and if he does so he is guilty of misdemeanor. If Stattler sold the automobile after the mortgage was given, he violated this section of the statute, for there was no evidence of any written consent to the sale on behalf of the mortgagee. The manner in which this property was transferred to Isenberger is also

testified he paid for the car himself. That on May 26, the date the car was bought, he cancelled a $800.00 book account, paid $400.00 in cash, and on June 2, gave Stattler his note for $715.00 due in one year. On May 31, 1923, appellant made a sworn application to the Secretary of State for a license for the car and the same was issued to her. On June 19, 1923, the sheriff found the car in the custody of the appellant and asked her whether she owned it stating that he was the sheriff and proposed to levy an execution on the car as the property of Stattler. This conversation took place in the streets of Lamark in front of the place of business of Stattler. In response to the inquiry of the sheriff, appellant said the car was not hers, and indicated by a nod of her head that it was owned by Stattler.

The question is whether this evidence was sufficient to justify the jury in returning a verdict finding that the appellant was not the owner of the car. It is conceded that when the car was originally bought the $400.00 trade of Stattler was credited upon the purchase price. Stattler paid $800.00 in cash, according to his own testimony and executed a mortgage for $715.00. It is claimed that these papers were originally made out in the name of appellant, but for some reason were changed and Stattler's name was substituted. If Stattler was not the owner of the car, it is difficult to understand how he could execute a chattel mortgage to secure the balance of the purchase price, and how that chattel mortgage could be accepted by Wagner & Son as a part of the purchase price. Section 7, chapter 95, of the statute provides that where a chattel mortgage is executed upon personal property, during the existence of the lien, the mortgagor shall not sell the property without the written consent of the mortgagee, and if he does so he is guilty of misdemeanor. If Stattler sold the automobile after the mortgage was given, he violated this section of the statute, for there was no evidence of any written consent to the sale on behalf of the mortgagee. The manner in which this property was transferred to Isenberger is also

a circumstance which should be taken into consideration in determining the ownership of the car. Without any apparent reason, Stattler, after buying the car and obligating himself to pay for it, sold it to Isenberger and took the latter's unsecured note for $715.00 payable in one year. The car was levied on as the property of Stattler. Appellant disclaimed all title to it at that time. Later it was claimed by Henry Isenberger and still later appellant changed her mind and claimed the car belonged to her. The evidence also tends very strongly to show that Wagner & Son were very uncertain as to the original purchaser and as to the owner at the time of the levy. Taking all the evidence into consideration, it was a question of fact for the jury to determine whether the evidence sustained the verdict. The mere fact that the evidence is in conflict is not sufficient to justify this court in reversing the judgment. In order to reverse a judgment, it is necessary that it be clearly and manifestly against the weight of the evidence. Grapperhaus v. Taylor, 195 Ill. App. 165. We cannot say the verdict is contrary to the evidence and cannot reverse it on that account.

Complaint is made of various instructions given on behalf of appellee. No good purpose would be served in considering each of them in detail. All we deem necessary is to say that we have examined the instructions and do not think there was any error in any of them which would justify us in reversing the judgment.

For this reason judgment will be affirmed.

Judgment affirmed.

a circumstance which should be taken into consideration in determining the ownership of the car. Without any apparent reason, Stattler, after buying the car and obligating himself to pay for it, sold it to Isenberger and took the latter's unsecured note for $715.00 payable in one year. The car was levied on as the property of Stattler. Appellant disclaimed all title to it at that time. Later it was claimed by Henry Isenberger and still later appellant changed her mind and claimed the car belonged to her. The evidence also tends very strongly to show that Wagner & Son were very uncertain as to the original purchaser and as to the owner at the time of the levy. Taking all the evidence into consideration, it was a question of fact for the jury to determine whether the evidence sustained the verdict. The mere fact that the evidence is in conflict is not sufficient to justify this court in reversing the judgment. In order to reverse a judgment, it is necessary that it be clearly and manifestly against the weight of the evidence. Grappenhaus v. Taylor, 195 Ill. App. 155. We cannot say the verdict is contrary to the evidence and cannot reverse it on that account.

Complaint is made of various instructions given on behalf of appellee. No good purpose would be served in considering each of them in detail. All we deem necessary is to say that we have examined the instructions and do not think there was any error in any of them which would justify us in reversing the judgment.

For this reason judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb, in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3530a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Frank W. Williams and
Albert Shawcross,
appellees,
vs.
Dell Garrett,
appellant,

Appeal from the Circuit Court
of Winnebago County.

Partlow, P.J.

Appellees, Frank W. Williams and Albert Shawcross, began suit before a justice of the peace in Winnebago county against the appellant, Dell Garrett, to recover a commission for the sale of real estate. A judgment was rendered against appellant for $218.75. An appeal was prosecuted to the circuit court of Winnebago county, where there was a trial by jury, a verdict against appellant for the same amount, and a further appeal has been prosecuted to this court.

The first error assigned is that the court improperly refused to direct a verdict in favor of appellant and improperly overruled his motion for a new trial. The appellant was 35 years of age and lived in Cherry Valley, in Winnebago county. The property in question consiste of a house and thirteen acres of land. The title had been in the appellant and several of his brothers and sisters. On July 28, 1921, these parties executed a quit claim deed to their mother for a consideration of one dollar. The appellant had placed the property for sale with at least one real estate agent other than appellees. Sometime after the deed was executed to the mother, Shawcross testified he had a conversation over the telephone with appellant relative to the sale, and appellant said the property was for sale, and he wanted $6250.00 for it. This conversation is denied by appellant. Sometime in November, 1921, Shawcross took a man by the name of Downey to look at the property. The house was vacant and when they reached the premises they found that appellant was there. There was some conversation between appellant and Shawcross, and Shawcross testified appellant told him he wanted $6,000.00 for

Frank W. Williams and
Albert Shawcross,
appellees,
vs.
Dell Garrett,
appellant,

Appeal from the Circuit Court
of Winnebago County.

Partlow, P.J.

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the property. There were various other meetings and conversations between the parties and finally Downey offered appellant $5,500.00 for the property. Appellant said he would have to write to his mother, who was in Dakota, and ask her about it. He wrote to her and a short time afterwards received an answer which he communicated to Shawcross. Shawcross testified appellant said that $5,500.00 would have to be the net price, and therefore he would take $5,750.00 out of which the commission was to be paid. Downey accepted the proposition and gave Shawcross a check for $25.00 to bind the bargain. A day or two later the parties met, and Shawcross testified that appellant said he had changed his mind and would not take $5,750.00. A dispute arose as to the payment of the commission. Shawcross insisted he had found a purchaser who was ready, willing and able to buy at the price specified, and that he was entitled to the commission. Appellant refused to pay and this law suit resulted.

It is undisputed that the title was in the mother, and appellant's principal defense is that he was contracting for her and not for himself. An agent is not liable on a contract made on behalf of his principal, if in fact, the other party with whom the contract was made, knew of the agency. It is only where the agent contracts as principal and does not disclose that he is acting as agent, that the agent becomes personally liable. Savage v. Stewart, 226 Ill. App. 388. It is the contention of appellees that they did not know the title was in the mother until after the offer of $5,500.00 was made by Downey, and that prior to that time they supposed the title was in the appellant; that he did not disclose his agency, and therefore contracted as principal and is bound. It is also contended by appellant that even conceding that the appellant contracted as principal, the appellees did not produce a purchaser who was ready, willing and able to buy at the stipulated price. He claims that the stipulated price was net to him and that appellees were to receive their commission over and above this amount. In support of this contention, he testified he contracted with other real estate

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agents on the same terms as those given to appellees, namely, that the price was to be net to him. In this he is contradicted by one other real estate agent who testified that nothing was said about the price being net. Shawcross testified he told appellant that appellees would charge him the regular real estate board commission and appellant replied that it was all right, he would pay the commission. This is denied by appellant. There is some conflict as to the acquaintanceship between Shawcross and appellant. Appellant testified he never met Shawcross until they met at the house in November, 1921. On the other hand, Shawcross testified he had known the appellant for many years, and for the last seven years had been fairly well acquainted with him, had ridden with him in his automobile, and been in pool rooms with him. The most that can be said of all the evidence is that it is in conflict as to the question of agency and as to the price for which the property was to be sold. The jury was the tribunal provided by law for the settlement of the dispute between these parties. If the jury believed the testimony of appellees, they were justified in returning the verdict which they did return. If on the other hand they believed the testimony on behalf of the appellant, they were not justified in returning this verdict. The authority of the appellate court to reverse a judgment is not an arbitrary authority but must be exercised according to well known rules of law. It has been held in a long line of cases that the judgment should be reversed by a court upon appeal only where it is clearly and manifestly against the weight of the evidence. Eggman v. Nutter, 169 Ill. App. 116; Hart v. Wilson, 177 Ill. App. 510. In the present condition of this evidence we do not think we are justified in reversing the judgment on the ground that it is clearly and manifestly against the weight of the evidence.

It is complained that the court improperly excluded the deed from appellant and his brothers and sister to his mother. The question of title was only incidentally at issue. It was claimed by the appellant throughout the trial that he was not the owner of the

agents on the same terms as those given to appellees, namely, that the price was to be n t to him. In this he is contradicted by one other real estate agent who testifies that nothing was said about the price being met. Shawoross testifies he told appellant that appellees would charge him the regular real estate board commission and appellant replied that it was all right, he would pay the commission. This is denied by appellees. There is some conflict as to the acquaintanceship between Shawoross and appellant. Appellant testified he never met Shawoross until they met at the house in November, 1921. On the other hand, Shawoross testifies he had known the appellant for many years, and for the last seven years had been fairly well acquainted with him, had ridden with him in his automobile, and been in pool rooms with him. The most that can be said of all the evidence is that it is in conflict as to the question of agency and as to the price for which the property was to be sold. The jury was the tribunal provided by law for the settlement of the dispute between these parties. If the jury believed the testimony of appellees, they were justified in returning the verdict which they did return. If on the other hand they believed the testimony on behalf of the appellant, they were not justified in returning this verdict. The authority of the appellate court to reverse a judgment is not an arbitrary authority but must be exercised according to well known rules of law. It has been held in a long line of cases that the judgment should be reversed by a court upon appeal only where it is clearly and manifestly against the weight of the evidence. Eggman v. Butler, 169 Ill. App. 116; Hart v. Wilson, 177 Ill. App. 510. In the present condition of this evidence we do not think we are justified in reversing the judgment on the ground that it is clearly and manifestly against the weight of the evidence.

It is complained that the court improperly excluded the deed from appellant and his brothers and sister to his mother. The question of title was only incidentally at issue. It was claimed by the appellant throughout the trial that he was not the owner of the

property. That fact was not disputed by the appellees. All through the evidence it appears that the appellant said he was acting as administrator. The fact that he was not the owner having been conceded, there was no reason for admitting the deed in evidence. A fact which is admitted does not have to be proven, and for this reason there was no error in the ruling of the trial court.

Complaint is made of the sixth and ninth instructions given on behalf of the appellees. The objection to the sixth instruction is that it does not take into consideration the contention of the appellant that he was acting as agent for his mother. The objection to the ninth instruction is that it does not refer to the evidence. The first instruction given on behalf of the appellees fully set out the law of agency and told the jury under what circumstances appellant would be liable as agent. While the sixth and ninth instructions standing alone might be subject to some of the criticism made against them, when they are considered in connection with all the other instructions we do not think the jury was mislead to the prejudice of the appellant.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

property. That fact was not disputed by the appellees. All through the evidence it appears that the appellant said he was acting as administrator. The fact that he was not the owner having been conceded, there was no reason for admitting the deed in evidence. A fact which is admitted does not have to be proven, and for this reason there was no error in the ruling of the trial court.

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We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(353/a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 330

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Judd Company, a corporation,

appellant,

vs.

L. J. Wilhelmi,

appellee,

Appeal from County Court

of Will County

Jett, J.

This suit was instituted before a Justice of the Peace in the county of Will. A trial was had by a jury and the finding was in favor of appellee. An appeal was prosecuted to the county court and the issues were submitted to a jury and the jury again found for appellee. Judgment was rendered against appellant for costs of suit, from which appellant prosecutes this appeal. The appellant, the Judd Company, was engaged in the selling of electric washing machines and it appointed appellee who is engaged in business in the City of Joliet, a representative of said company to sell and dispose of its machines. Appellee represented the appellant as a salesman for a period of two and one-half years prior to the beginning of this case.

During the time appellee was sales representative of the appellant he had in his employ as salesman Samuel Unmisig, and at the time this controversy arose, Esther Lindquist, a stenographer and book-keeper, was also in the employ of appellee. At the time of the trial of this cause both of said employees were in the employ of appellant.

On May 31, 1921, appellant sent to Joliet one of its employees by the name of Bauer, for the purpose of collecting an account due and owing from appellee to the appellant amounting to $2411.11. After the arrival of Bauer, at the office of appellee and prior to the issuing of a check in payment of the account in question, there was some discussion between Bauer and appellee in the presence of Miss Lindquist, as to the deduction of five per cent from the total amount of the bill which was the deduction allowed if the goods

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During the time appellee was sales representative of the appellant he had in his employ as salesman Samuel Dunlaig, and at the time this controversy arose, Esther Lindquist, a stenographer and book-keeper, was also in the employ of appellee. At the time of the trial of this cause both of said employees were in the employ of appellant.

On May 31, 1921, appellant sent to Joliet one of its employees by the name of Bauer, for the purpose of collecting an account due and owing from appellee to the appellant amounting to $221.11. After the arrival of Bauer, at the office of appellee and prior to the issuing of a check in payment of the account in question, there was some discussion between Bauer and appellee in the presence of Miss Lindquist, as to the deduction of five per cent from the total amount of the bill which was the deduction allowed if the goods

purchased were paid for within ten days. All of the machines involved in this account had been purchased and received by appellee for a period of more than ten days prior to the 31st day of May, 1921, the day on which the check was given.

The witness Lindquist, testified that when appellee requested that five per cent be deducted from the bill, Bauer informed appellee that his employer had not told him that appellee had the right to deduct five per cent, but if a deduction was made it must be sanctioned by the Chicago office of appellant. The deduction made by appellee amounted to $120.55.

Appellee denies that there was any conversation between him and Bauer in relation to the discount and insists that the deduction was allowed to him by Bauer without any discussion as to whether or not he was entitled to it. A few days after May 31, 1921, and after the payment by appellee to Bauer of the amount due less five per cent, a ~~xxxxx~~ letter was written by appellant to appellee requesting payment of the five per cent deducted which letter appellee denies having received, although the witness Lindquist testified it was received at the office of appellee and that she and appellee discussed its contents. The testimony of appellee relative to whether or not this letter in question ever came to his office is rather of an evasive character.

In June, 1921, appellee desired for his business two washing machines manufactured by appellant and instructed his stenographer and book-keeper to write to appellant to forward to him two machines. As the machines were not shipped Miss Lindquist dalled the appellant company in Chicago and talked to a Mr. McGrew, an employee in the office of appellant and she was informed by him that no more machines would be forwarded until the $120.55 was paid. At this time appellee was called to the phone and held a conversation with McGrew and appellant insists that appellee promised that in the event the two machines were sent to appellee at Joliet that he would pay $100 in settlement of the account in controversy.

The two machines requested by appellee were sent to him. They

purchased were paid for within ten days. All of the machines involved in this account had been purchased and received by appellee for a period of more than ten days prior to the 31st day of May, 1921, the day on which the check was given.

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Appellee denies that there was any conversation between him and Bauer in relation to the discount and insists that the deduction was allowed to him by Bauer without any discussion as to whether or not he was entitled to it. A few days after May 31, 1921, and after the payment by appellee to Bauer of the amount due less five per cent, a letter was written by appellant to appellee requesting payment of the five per cent deducted which letter appellee denies having received, although the witness Lindquist testified it was received at the office of appellee and that she and appellee discussed its contents. The testimony of appellee relative to whether or not this letter in question ever came to his office is rather of an evasive character.

In June, 1921, appellee desired for his business two washing machines manufactured by appellant and instructed his stenographer and book-keeper to write to appellant to forward to him two machines. As the machines were not shipped Miss Lindquist called the appellant company in Chicago and talked to a Mr. Morrew, an employee in the office of appellant and she was informed by him that no more machines would be forwarded until the $120.55 was paid. At this time appellee was called to the phone and held a conversation with Morrew and appellant insists that appellee promised that in the event the two machines were sent to appellee at Joliet that he would pay $100 in settlement of the account in controversy.

The two machines requested by appellee were sent to him. They

were paid for but appellee never paid anything on the account in question. Although the two machines were received and paid for by appellee he testified he did not remember ordering them.

That appellee promised he would pay $100 on this account in the event the two machines were forwarded to him is also testified to by the witnesses Lindquist and Unmisig. Appellee does not deny that he had a conversation with some one in appellants office over the phone but does deny that he offered to pay $100. Miss Lindquist testified that when she informed Wilhelmi she was going to leave his employ, he said Judd will never get that $100.

It is invisted by appellant that Bauer was authorized merely to collect and receive payment of the debt due from appellee and that he could not bind appellant by any arrangement other than an actual collection and receipt of the money due. That an agent to collect cannot in any way compromise, adjust or reduce his principal's claim without the consent of his principal. It is also claimed by appellant that there was no ratification of the act of the agent Bauer. Before a principal can be held to have ratified an unauthorized act of his agent it must appear that he was fully informed of all the material facts relative to the subject matter to which the alleged ratification is intended to apply. Bank v. Miller, 105 Ill. App. 224; Bank v. Ferris, 118 Ill. 465.

The defense made in this case is what is known as an affirmative one, and the burden of proving an affirmative defense is upon the party relying upon such a defense. Baker v. Abbott, 212 Ill. App.476.

Appellee relies upon what was said to him by the president of the appellant company to sustain his right to deduct five per cent of the claim. We have examined the testimony of appellee bearing upon what he insists the president of said company said to him relative to the business and we are of the opinion that even though the president of the company used the language appellee claims, "get machines, more machines, never mind the bill, just get machines, take care of them any time through the year," does not authorize the discounting of the bills five per cent.

were paid for but appellee never paid anything on the account in question. Although the two machines were received and paid for by appellee he testified he did not remember ordering them.

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It is insisted by appellant that Bauer was authorized merely to collect and receive payment of the debt due from appellee and that he could not bind appellant by any arrangement other than an actual collection and receipt of the money due. That an agent to collect cannot in any way compromise, adjust or reduce his principal's claim without the consent of his principal. It is also claimed by appellant that there was no ratification of the act of the agent Bauer. Before a principal can be held to have ratified an unauthorized act of his agent it must appear that he was fully informed of all the material facts relative to the subject matter to which the alleged ratification is intended to apply. Bank v. Miller, 105 Ill. App. 224; Bank v. Ferris, 118 Ill. 465.

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The weight of the testimony as to what was said over the phone is against the contention of appellee. McGrew, Lindquist and Unmisig all testify to the effect that appellee promised to settle this account in controversy for $100 if the two machines that he desired forwarded to him were furnished. Appellee alone denies it. The case on the part of appellee rests almost entirely on his testimony. His evidence is indefinite and uncertain.

From the evidence in this record we are not prepared to say that appellee has proven by a preponderance of the evidence that Bauer acted within his authority when he allowed the discount. The burden of proof of the authority of an agent is on the party dealing with such agent. Foster v. Graf, 287 Ill. 559.

The weight of the testimony does disclose that Bauer when he accepted a check for the bill less a discount of five per cent, informed appellee that such action would have to be sanctioned by appellant. This court is reluctant to set aside the verdict of a jury where the evidence is conflicting, still it is a well settled rule of law in this state where there is no evidence on which the verdict of a jury can be based or where there is a clear preponderance of evidence in favor of the party against whom the verdict is rendered the verdict will be set aside.

We are of the opinion the court erred in denying the motion for a new trial. That the weight of the testimony in this case is clearly with appellant, and for that reason the judgment of the court below is reversed and remanded.

Reversed and remanded.

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The weight of the testimony does disclose that Bauer when he accepted a check for the bill less a discount of five per cent, informed appellee that such action would have to be sanctioned by appellant. This court is reluctant to set aside the verdict of a jury where the evidence is conflicting, still it is a well settled rule of law in this state where there is no evidence on which the verdict of a jury can be based or where there is a clear preponderance of evidence in favor of the party against whom the verdict is rendered the verdict will be set aside.

We are of the opinion the court erred in denying the motion for a new trial. That the weight of the testimony in this case is clearly with appellant, and for that reason the judgment of the court below is reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb, in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3532a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 7 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7242 Agenda 17

Samuel Hoge, Administrator of
the Estate of Joshua Hoge, deceased,
appellee,

vs.

James C. Barr,
appellant,

Appeal from the Circuit Court
of Grundy County.

Jett, J.

Appellee, administrator of the estate of Samuel Hoge, deceased, by H. B. Smith his attorney, obtained a judgment by confession on October 2nd, 1922, in vacation, pending the September term of the Grundy County Circuit Court, against James C. Barr, appellant, for $1727.28. The same day on which the judgment was entered appellant tendered to H. B. Smith, attorney for appellee, the sum of $1518.40, which said sum of money was brought into court by appellant with a motion to vacate the judgment. On the following day, namely, the third day of October, 1922, appellee served notice upon the appellant that he would file a motion in the circuit court of said county and ask the court to modify the judgment by reducing the same to the extent of $63.68.

The appellant on the same day filed his verified petition to set aside the judgment entered against him on the said second day of October. The petition of appellant filed in support of his motion to vacate the judgment was in part as follows; "And now comes James C. Barr, defendant in the above entitled cause, and moves the Court to set aside the judgment heretofore, on the second day of October, 1922, entered against him in said cause by the Clerk of said Court, without process, and purporting to have been by your Petitioner duly authorized, and for leave to plead to the declaration filed therein, and to defend said suit upon the merits, and as gounds for said motion, Petitioner shows to the Court that the note in question was for the sum of $6,100.00, dated October 23rd, 1920, drawing interest at the rate of seven per cent (7 per cent) per annum from October 25th, 1920, and that this defendant paid the interest on

Samuel Hoge, Administrator of
the Estate of Joshua Hoge, deceased,
appellee,
vs.
James C. Barr,
appellant,

Appeal from the Circuit Court
of Grundy County.

Jett, J.

Appellee, administrator of the estate of Samuel Hoge, deceased, by H. B. Smith his attorney, obtained a judgment by confession on October 2nd, 1922, in vacation, pending the September term of the Grundy County Circuit Court, against James C. Barr, appellant, for $1727.38. The same day on which the judgment was entered appellant tendered to H. B. Smith, attorney for appellee, the sum of $1818.40, which said sum of money was brought into court by appellant with a motion to vacate the judgment. On the following day, namely, the third day of October, 1922, appellee served notice upon the appellant that he would file a motion in the circuit court of said county and ask the court to modify the judgment by reducing the same to the extent of $63.68.

The appellant on the same day filed his verified petition to set aside the judgment entered against him on the said second day of October. The petition of appellant filed in support of his motion to vacate the judgment was in part as follows; "And now comes James C. Barr, defendant in the above entitled cause, and moves the court to set aside the judgment heretofore, on the second day of October, 1922, entered against him in said cause by the Clerk of said Court, without process, and purporting to have been by your Petitioner duly authorized, and for leave to plead to the declaration filed therein, and to defend said suit upon the merits, and as grounds for said motion, Petitioner shows to the Court that the note in question was for the sum of $6,100.00, dated October 23rd, 1920, drawing interest at the rate of seven per cent (7 per cent) per annum from October 25th, 1920, and that this defendant paid the interest on

said note to April 23rd, 1921; and that this defendant paid on the principal of said note, the sum of Two Thousand $2,000.00) Dollars on September 29, 1921; and that this defendant paid on the principal of said note on June 15th, 1922, the sum of Three Thousand ($3000.00) Dollars; that both the said principal payments were made to the Plaintiff herein, and that the interest payment aforesaid was paid to Joshua Hoge in his life time; that the said Joshua Hoge, at the time of the payment of said interest was the legal owner and holder of said note, and that Samuel Hoge, as Administrator of the Estate of Joshua Hoge, deceased, was the legal owner and holder of said note at the time of said principal payments, as aforesaid.

That judgment was entered by confession in this cause, on the second day of October, 1922. That said judgment was excessive in the sum of $214.38. That the full amount of the balance on said note on October 2nd, 1922, including both principal and interest, was the sum of Fifteen Hundred Eighteen Dollars and Forty Cents, ($1518.40) and that this defendant tendered to the plaintiff on October 2nd, 1922, at 4:40 o'clock p.m., the sum of Fifteen Hundred Eighteen Dollars and Forty Cents ($1518.40), in legal tender, and has ever since kept said tender good, and does now tender into Court the sum of Fifteen Hundred Eighteen Dollars and Forty Cents ($1518.40)".

The court convened on October 7th, 1922, at which time appellee entered his motion to amend the judgment by reducing the same in the sum of $63.68. The said motion to reduce the judgment in the sum last mentioned, was allowed, and judgment was entered for appellee in the sum of $1664.10, and immediately thereafter appellee remitted the further sum of $25.00 and judgment was, by the court, confirmed in the sum of $1639.10.

Appellant again, in open court, tendered the sum of $1518.40 and renewed his motion to set aside the judgment, which said motion was overruled and this appeal followed.

The only question involved in this cause, is whether or not the court should have confirmed the judgment as it did, without reducing

said note to April 23rd, 1921; and that this defendant paid on the principal of said note, the sum of Two Thousand ($2,000.00) Dollars on September 29, 1921; and that this defendant paid on the principal of said note on June 15th, 1922, the sum of Three Thousand ($3000.00) Dollars; that both the said principal payments were made to the plaintiff herein, and that the interest payment aforesaid was paid to Joshua Hoge in his life time; that the said Joshua Hoge, at the time of the payment of said interest was the legal owner and holder of said note, and that Samuel Hoge, as Administrator of the estate of Joshua Hoge, deceased, was the legal owner and holder of said note at the time of said principal payments, as aforesaid.

That judgment was entered by confession in this cause, on the second day of October, 1922. That said judgment was excessive in the sum of $214.38. That the full amount of the balance on said note on October 2nd, 1922, including both principal and interest, was the sum of Fifteen Hundred Eighteen Dollars and Forty Cents, ($1518.40) and that this defendant tendered to the plaintiff on October 2nd, 1922, at 4:40 o'clock p.m., the sum of Fifteen Hundred Eighteen Dollars and Forty Cents ($1518.40), in legal tender, and has ever since kept said tender good, and does now tender into Court the sum of Fifteen Hundred Eighteen Dollars and Forty Cents ($1518.40)".

The court convened on October 7th, 1922, at which time appellee entered his motion to amend the judgment by reducing the same in the sum of $63.88. The said motion to reduce the judgment in the sum last mentioned, was allowed, and judgment was entered for appellee in the sum of $1664.10, and immediately thereafter appellee remitted the further sum of $23.00 and judgment was, by the court, confirmed in the sum of $1641.10.

Appellant again, in open court, tendered the sum of $1518.40 and renewed his motion to set aside the judgment, which said motion was overruled and this appeal followed.

The only question involved in this cause, is whether or not the court should have confirmed the judgment as it did, without reducing

the amount which had been allowed appellee as attorney's fees. The rule is well settled that a judgment by confession is not authorized for any greater amount than that specified in the warrant, and if the judgment is for an amount in excess of the sum due, and is opened up on that account, no attorney's fees are allowable. It is evident that it was because of the action taken by appellant to set aside the judgment that caused appellee to attempt to forestall him by getting the judgment amended and thereby reduce it. We are of the opinion that appellee's attorney's fees can not be saved in that way.

The motion of appellant to vacate the judgment was supported by an uncontradicted affidavit showing that the judgment entered was excessive in the sum of $214.38. Appellee by his conduct concedes that the judgment obtained in vacation was excessive. The record discloses the fact that three judgments were entered in this proceeding. First for $1727.78. Then for $1664.10, on motion of appellee, and subsequently for $1639.10. The two last judgments having been entered after the motion of appellant to vacate, and the petition in support thereof had been filed, and after tender had been made.

In the case of Lanyon v. Lantz, Owen and Co., 43 Ill. App. 654, a very similar state of facts was passed upon. The confession of judgment was for a larger sum than the creditor claimed was due. The appellant made a motion to set aside the judgment and to be allowed to plead. A sworn petition was filed and was wholly uncontradicted. The court below denied the motion. In reversing the judgment the court said; "The court erred in denying the motion to let appellant in to plead to the disputed portions of the judgment note". We are of the opinion that the showing made was sufficient to permit the opening up of the judgment and permitting appellant to plead to the disputed portion of the note. In view of the fact, however, that a tender was made and by reason of the facts as disclosed by this record this cause is reversed and remanded with

the amount which had been allowed appellee as attorney's fees.

The rule is well settled that a judgment by confession is not authorized for any greater amount than that specified in the warrant, and if the judgment is for an amount in excess of the sum due, and is opened up on that account, no attorney's fees are allowable. It is evident that it was because of the action taken by appellant to set aside the judgment that caused appellee to attempt to forestall him by getting the judgment amended and thereby reduce it. We are of the opinion that appellee's attorney's fees can not be saved in that way.

The motion of appellant to vacate the judgment was supported by an uncontradicted affidavit showing that the judgment entered was excessive in the sum of $214.38. Appellee by his counsel concedes that the judgment obtained in vacation was excessive. The record discloses the fact that three judgments were entered in this proceeding. First for $1727.78. Then for $1664.10, on motion of appellee, and subsequently for $1639.10. The two last judgments having been entered after the motion of appellant to vacate, and the petition in support thereof had been filed, and after tender had been made.

In the case of Lanyon v. Lantz, Owen and Co., 43 Ill. App. 664, a very similar state of facts was passed upon. The confession of judgment was for a larger sum than the creditor claimed was due. The appellant made a motion to set aside the judgment and to be allowed to plead. A sworn petition was filed and was wholly uncontradicted. The court below denied the motion. In reversing the judgment the court said; "The court erred in denying the motion to let appellant in to plead to the disputed portions of the judgment note". We are of the opinion that the showing made was sufficient to permit the opening up of the judgment and permitting appellant to plead to the disputed portion of the note. In view of the fact, however, that a tender was made and by reason of the facts as disclosed by this record this cause is reversed and remanded with

directions to the trial court to enter judgment in favor of the appellee and against the appellant for the amount due as principal and interest on the note declared upon without attorney's fees. The amount due on the note will be compute as of the date of the tender. The costs in the court below will be taxed against the appellant.

Reversed and remanded with directions.

directions to the trial court to enter judgment in favor of the appellee and against the appellant for the amount due as principal and interest on the note declared upon without attorney's fees. The amount due on the note will be computed as of the date of the tender. The costs in the court below will be taxed against the appellant.

Reversed and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb, in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3533a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State
of Illinois,
Defendant in error,
vs.
Frank Vanella and Graceffo
Meggorini,
Plaintiffs in error,

Error to the Circuit Court
of Winnebago County

Jett, J.

At the April term, 1923, of the circuit court of Winnebago county, the grand jury of said county returned a true bill of indictment, against the plaintiffs in error, containing four counts, charging them in the first count with unlawfully manufacturing intoxicating liquor; in the second count with unlawfully possessing intoxicating liquor; in the third count with unlawfully operating a still; and in the fourth count with unlawfully possessing a still.

Plaintiffs in error each waived a trial by jury and were tried by the court on the four counts of the indictment on the 24th day of April,1923. Plaintiff in error Frank Vanella was found guilty on all four counts and was sentenced to confinement in the county jail for a period of six months on the first county, six months on the second count, said last sentence to run concurrently with the sentence on the first count, six months on the third count such sentence to run concurrently with the sentence on the second counrt, and six months on the fourth count, the latter sentence to run concurrently with the sentence on the third count, and to pay the costs of prosecution and to stand committed until the costs were paid.

Plaintiff in error Graceffo Meggorini was found guilty on the second count of the indictment and not guilty on all other counts and was sentenced to confinement in the county jail for a period of two months and to pay the costs of the proceedings and to stand committed until the costs were paid. The plaintiffs in error each prosecuted this writ of error.

The People of the State
of Illinois,
Defendant in error,
vs.
Frank Vamelis and Graceffo
Meggorini,
Plaintiffs in error.

Error to the Circuit Court
of Winnebago County

Jett, J.

At the April term, 1923, of the circuit court of Winnebago county, the grand jury of said county returned a true bill of indictment, against the plaintiffs in error, containing four counts, charging them in the first count with unlawfully manufacturing intoxicating liquor; in the second count with unlawfully possessing intoxicating liquor; in the third count with unlawfully operating a still; and in the fourth count with unlawfully possessing a still.

Plaintiffs in error each waived a trial by jury and were tried by the court on the four counts of the indictment on the 24th day of April, 1923. Plaintiff in error Frank Vamelis was found guilty on all four counts and was sentenced to confinement in the county jail for a period of six months on the first count, six months on the second count, said last sentence to run concurrently with the sentence on the first count, six months on the third count such sentence to run concurrently with the sentence on the second count, and six months on the fourth count, the latter sentence to run concurrently with the sentence on the third count, and to pay the costs of prosecution and to stand committed until the costs were paid.

Plaintiff in error Graceffo Meggorini was found guilty on the second count of the indictment and not guilty on all other counts and was sentenced to confinement in the county jail for a period of two months and to pay the costs of the proceedings and to stand committed until the costs were paid. The plaintiffs in error each prosecuted this writ of error.

It appears that a search warrant was issued to an officer of the City of Rockford to search certain premises namely a certain house and greenhouse located and known as 704 Dickerman Street in the said City of Rockford, for intoxicating liquor, mash, still and utensils used for the illegal manufacture of intoxicating liquors.

On the day that the search warrant was issued a search of the premises was made and about seventy gallons of distilled liquor, called moonshine, eight-fifty gallon barrels of wine, one fifteen gallon still, one forty gallon still, about nine hundred pounds of glucose sugar and other ingredients used for making liquor were seized by virtue of such search warrant. All having been found in two dugouts in said greenhouse, and the same together with plaintiffs in error found in possession, were taken to the police station and subsequently before the magistrate who issued the warrant in accordance with the commands of said writ.

It also appears from the evidence that a number of barrels of whiskey mash were found in the green house and that one of the stills was warm as if it had been recently operated.

The plaintiffs in error objected to the legality and sufficiency of the complaint and search warrant and asked the court to impound all the liquor, implements and ingredients seized. It appears that there were two houses upon the same lot in Dickerman street. One of the houses was at the front of the lot facing Dickerman Street numbered 704 and the other was back of the first house and apparently on the same lot. The rear house had the number 704½ scrawled on it in chalk. The greenhouse was located immediately back and in a short distance of the rear house.

The return of the officers showed that all of the intoxicating liquor, ingredients and implements seized were found in and taken from the greenhouse in question, which he described as, "the greenhouse at the rear of 704½ Dickerman Street."

The motion to impound the liquor, implements and ingredients was sustained as to any liquor and stills which may have been taken

It appears that a search warrant was issued to an officer of the City of Rockford to search certain premises namely a certain house and greenhouse located and known as 704 Dickerman street in the said City of Rockford, for intoxicating liquor, mash, still and utensils used for the illegal manufacture of intoxicating liquors.

On the day that the search warrant was issued a search of the premises was made and about seventy gallons of distilled liquor, called moonshine, eight-fifty gallon barrels of wine, one fifteen gallon still, one forty gallon still, about nine hundred pounds of glucose sugar and other ingredients used for making liquor were seized by virtue of such search warrant. All having been found in two dugouts in said greenhouse, and the same together with plaintiffs in error found in possession, were taken to the police station and subsequently before the magistrate who issued the warrant in accordance with the commands of said writ.

It also appears from the evidence that a number of barrels of whiskey mash were found in the green house and that one of the stills was warm as if it had been recently operated.

The plaintiffs in error objected to the legality and sufficiency of the complaint and search warrant and asked the court to impound all the liquor, implements and ingredients seized. It appears that there were two houses upon the same lot in Dickerman street. One of the houses was at the front of the lot facing Dickerman street numbered 704 and the other was back of the first house and apparently on the same lot. The rear house had the number 704½ scrawled on it in chalk. The greenhouse was located immediately back and in a short distance of the rear house.

The return of the officers showed that all of the intoxicating liquor, ingredients and implements seized were found in and taken from the greenhouse in question, which he described as, "the greenhouse at the rear of 704½ Dickerman Street."

The motion to impound the liquor, implements and ingredients was sustained as to any liquor and stills which may have been taken

from the house which was chalkmarked "704½" but overruled as to the liquors and things taken from the greenhouse and the house marked "704". Number "704" was vacant. The upper floor of "704½" was the residence of the plaintiffs in error.

The liquor, stills, sugar and other things obtained by reason of the search were found in the greenhouse. The warrant to search the premises described the place with reasonable certainty and was located by the officer or officers armed with such writ. Complaint is made because the names of the plaintiffs in error did not appear in the search warrant. The names of the plaintiffs in error are unusual ones and Vanella is known by more than one name. It appears that the affidavit filed as a basis for the search warrant discloses the fact that the occupants of the premises were unknown.

In view of all of the facts as disclosed by the record in this proceeding we are of the opinion that the court committed no error in refusing the motion to impound the liquor, still and other implements obtained by virtue of the search warrant.

It is also urged by the plaintiffs in error that the second, third and fourth counts of the indictment do not charge a crime against the laws of the State of Illinois. Whether this be true or not would not relieve plaintiff in error Vanella, for he was sentenced under the first count of the indictment to six months in the county jail and the sentence on each of the other counts run concurrently with the sentence under the first count.

The second count charges that the plaintiffs in error on the 30th day of March, 1923, at and within the county of Winnebago, intoxicating liquor unlawfully did then and there possess, said act being then and there prohibited and unlawful; the third count charges that the plaintiffs in error on said last date a still unlawfully did then and there operate, said act being then and there prohibited and unlawful; and the courth count on said date and in said county a still unlawfully did then and there have in their possession, said act being then and there prohibited and unlawful. We are clearly of the opinion that each count charged an

from the house which was chalkmarked "704½" but overruled as to the liquors and things taken from the greenhouse and the house marked "704". Number "704" was vacant. The upper floor of "704½" was the residence of the plaintiff in error.

The liquor, stills, sugar and other things obtained by reason of the search were found in the greenhouse. The warrant to search the premises described the place with reasonable certainty and was located by the officer or officers armed with such writ. Complaint is made because the names of the plaintiffs in error did not appear in the search warrant. The names of the plaintiffs in error are unusual ones and Vamelia is known by more than one name. It appears that the affidavit filed as a basis for the search warrant discloses the fact that the occupants of the premises were unknown.

In view of all of the facts as disclosed by the record in this proceeding we are of the opinion that the court committed no error in refusing the motion to impound the liquor, stills and other implements obtained by virtue of the search warrant.

It is also urged by the plaintiffs in error that the second, third and fourth counts of the indictment do not charge a crime against the laws of the state of Illinois. Whether this be true or not would not relieve plaintiff in error Vamelia, for he was sentenced under the first count of the indictment to six months in the county jail and the sentence on each of the other counts run concurrently with the sentence under the first count.

The second count charges that the plaintiffs in error on the 30th day of March, 1928, at and within the county of Winnebago, intoxicating liquor unlawfully did then and there possess, said act being then and there prohibited and unlawful; the third count charges that the plaintiffs in error on said last date a still unlawfully did then and there operate, said act being then and there prohibited and unlawful; and the fourth count on said date and in said county a still unlawfully did then and there have in their possession, said act being then and there prohibited and unlawful. We are clearly of the opinion that each count charged an

offense under the Prohibition Act and that each count of the indictment was a good count, and sufficient to sustain the judgment.

It is further contended by the plaintiffs in error that the evidence does not sustain the judgment. The evidence was to the effect that the officers found and obtained 70 gallons of liquor, 8 fifty gallon barrels of wine, 900 pounds of sugar, 15 barrels of whiskey mash, together with stills. This liquor and these articles were found in the dugout in the greenhouse ahd the plaintiffs in error were found in the greenhouse at the same time. The plaintiff in error Meggorini was convicted under the second count which charged an unlawful possession of liquor. She was not only found in the greenhouse but in one of the dugouts and stated that one of the barrels of wine belonged to her.

This evidence together with other facts and circumstances that developed on the trial of the case is sufficient to sustain the judgment, against each of the plaintiffs in error.

We conclude, therefore, that the judgment of the court below should be affirmed.

Affirmed.

offense under the Prohibition Act and that each count of the indictment was a good count, and sufficient to sustain the judgment.

It is further contended by the plaintiffs in error that the evidence does not sustain the judgment. The evidence was to the effect that the officers found and obtained 70 gallons of liquor, 8 fifty gallon barrels of wine, 900 pounds of sugar, 15 barrels of whiskey mash, together with stills. This liquor and these articles were found in the dugout in the greenhouse and the plaintiffs in error were found in the greenhouse at the same time. The plaintiff in error Meggorini was convicted under the second count which charged an unlawful possession of liquor. She was not only found in the greenhouse but in one of the dugouts and stated that one of the barrels of wine belonged to her.

This evidence together with other facts and circumstances that developed on the trial of the case is sufficient to sustain the judgment, against each of the plaintiffs in error.

We conclude, therefore, that the judgment of the court below should be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3534a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 631

BE IT REMEMBERED, that afterwards, to-wit: On JAN - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Farmers and Merchants State
Bank of Forrest, Illinois,

appellee,

vs.

M. B. Wells (Bridgeport State
Bank, a corporation,

appellant,)

Appeal from Circuit Court
of Livingston County

Jett, J.

On May 26, 1919, the Farmers and Merchants State Bank of Forrest, Illinois, instituted a suit in assumpsit against M. B. Wells. An attachment writ in aid of said cause was issued and on said May 26, 1919, was levied upon one hundred shares of the capital stock of said bank. The defendant in attachment, Wells, appeared by his attorneys, filed his pleas and traversed the affidavit for attachment; issues were joined but no further steps were taken until the January Term, 1923, when the case was continued on the application of the defendant. Subsequently and on March 14, 1923, under a stipulation entered into by appellee and Wells, the order continuing the cause was set aside and judgment rendered in favor of appellee for $11,368.27, and a special execution was awarded against the property attached. At the same term of court the Bridgeport State Bank entered its motion to vacate said judgment and for leave to intervene, supporting its motion by affidavit. From the order of the circuit court denying this motion the Bridgeport State Bank has appealed.

It appears from the affidavit of appellant that after the writ of attachment was levied, the defendant, M. B. Wells, for a full and valuable consideration, transferred said shares of stock to appellant; that on January 7, 1921, the plaintiff had notice of said transfer; that Wells at all times claimed to appellant there was no foundation for said attachment writ and that he intended to contest that issue and pretended he was co-operating with appellant

Farmers and Merchants State
Bank of Forrest, Illinois,

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It appears from the affidavit of appellant that after the writ of attachment was levied, the defendant, M. B. Wells, for a full and valuable consideration, transferred said shares of stock to appellant; that on Jan ary 7, 1921, the plaintiff had notice of said transfer; that Wells at all times claimed to appellant there was no foundation for said attachment writ and that he intended to contest that issue and pretended he was co-operating with appellant

and would continue so doing; that on the day said cause was set for trial Wells pretended that he could not safely go to trial as he had lost some necessary documentary evidence and thereupon said case was continued; that from the investigation appellant made, it is satisfied that M. B. Wells had a defense to a portion of the plaintiff's claim and that there was no foundation in fact for the issuing of the attachment writ and that M. B. Wells would have had a good and lawful defense thereto; that petitioner intended in and through the name of Wells to make a defense and if permitted to intervene a good defense thereto would be interposed and the attachment writ would be quashed.

A counter affidavit on the part of appellee was filed stating that a search of the files, records and court dockets in the circuit court with reference to this cause, failed to disclose the name of the Bridgeport State Bank or its attorneys; that the attorneys representing Wells knew of the stipulation and were present when the stipulation was called to the attention of the court at the time judgment was entered, and that the attorneys for appellee had no notice the attorneys representing appellant had any connection with the case other than in conjunction with the firm of attorneys representing Wells; that he had carefully examined the evidence with reference to the attachment issue and believed that the evidence thereon was sufficient to authorize a finding in favor of appellee. The question therefore to be determined is whether or not the court was correct in overruling the motion to vacate the judgment and to grant leave to intervene. This proceeding is one in attachment, and as such is purely statutory. The right to interplead is found in section 29 of the Attachment Act, which provides; "In all cases of attachment, any person, other than the defendant, claiming the property attached, may interplead, verifying his plea by affidavit * * * * * *, and the court shall immediately direct a jury to be impanelled to inquiry into the rights of property."

Appellee, in its affidavit for attachment, made no claim that it was the owner of the property attached, but simply took steps to

and would continue so doing; that on the day said cause was set for trial Wells pretended that he could not safely go to trial as he had lost some necessary documentary evidence and thereupon said case was continued; that from the investigation appellant made, it is satisfied that M. B. Wells had a defense to a portion of the plaintiff's claim and that there was no foundation in fact for the issuing of the attachment writ and that M. B. Wells would have had a good and lawful defense thereto; that petitioner intended in and through the name of Wells to make a defense and if permitted to intervene a good defense thereto would be interposed and the attachment writ would be quashed.

A counter affidavit on the part of appellee was filed stating that a search of the files, records and court dockets in the circuit court with reference to this cause, failed to disclose the name of the Bridgeport State Bank or its attorneys; that the attorneys representing Wells knew of the stipulation and were present when the stipulation was called to the attention of the court at the time judgment was entered, and that the attorneys for appellee had no notice the attorneys representing appellant had any connection with the case other than in conjunction with the firm of attorneys representing Wells; that he had carefully examined the evidence with reference to the attachment issue and believed that the evidence thereon was sufficient to authorize a finding in favor of appellee. The question therefore to be determined is whether or not the court was correct in overruling the motion to vacate the judgment and to grant leave to intervene. This proceeding is one in attachment, and as such is purely statutory. The right to interplead is found in section 29 of the Attachment Act, which provides; "In all cases of attachment, any person, other than the defendant, claiming the property attached, may interplead, verifying his plea by affidavit * * * * *, and the court shall immediately direct a jury to be impanelled to inquiry into the rights of property."

Appellee, in its affidavit for attachment, made no claim that it was the owner of the property attached, but simply took steps to

have a trial for the purpose of determining whether the defendant in attachment owed it or not, and was about to fraudulently conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors.

In May v. Disconto Geselleschaft, 211 Ill. 310, which was a suit in attachment where the levy was made on August 19, 1901, and some days later the defendant in attachment assigned the property levied upon to May, who, by interpleader, endeavored to show his title superior to the rights of the attaching creditor. On page 316 the court said; "It is a sufficient answer to say that the right asserted by interpleader is not that of a creditor, but of an assignee of the property. He claims to be the owner of the property and interpleads by virtue of section 29 of chapter 11, Hurd's Revised Statutes of 1903. Under that section the only thing to be tried is the right of property. The right of a simple contract creditor to have his debts satisfied can not be asserted by interpleading in an attachment suit."

To the same effect is City Ins. Co. v. Commercial Bank, 68 Ill. 348. At the time of entering judgment herein the attachment case had been pending almost four years. Appellant had taken no steps to inform the court of its claim or that it was in any way interested in the proceedings but chose rather to rely upon the representations of Wells. The law is against the contention of appellant. Appellant has failed to show that it was entitled to have the judgment vacated. In our opinion no error was committed by the trial court in denying the motion of appellant, and the order appealed from is affirmed.

Affirmed.

have a trial for the purpose of determining whether the defendant in attachment owed it or not, and was about to fraudulently conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors.

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Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3535a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7254
~~7285~~

The People of the State of Illinois,

Defendant in error,

vs.

Morris Kipnis,

Plaintiff in error,

Error to the Circuit Court of Carroll County

Jett, J.

Morris Kipnis, plaintiff in error, was indicted by the grand jury of Carroll County at the November term, 1922, of the circuit court of said county, for unlawfully possessiong, furnishing and selling intoxicating liquor. He was tried at the following June term of said court, and found guilty under the first and fourth counts of the indictment. The first count charged the unlawful possession of intoxicating liquor and the fourth charged the unlawful furnishing of intoxicating liquor.

Motion for a newtrial was denied and the court fined the plaintiff in error Two Hundred and Fifty Dollars on each count. This writ of error followed. The sufficienty of the indictment is not challenged.

It is urged that the court erred in refusing the motion of the plaintiff in error, at the close of the People's testimony, to instruct the State's Attorney that if a verdict of guilty was returned, it would be set aside.

The court ~~xxxx~~ was possessed of the authority, if at the conclusion of the evidence on the part of the prosecution it was of the opinion that the People had not made out a case to so inform the State's Attorney, and to suggest to him that he would grant a new trial in the event of a verdict of guilty. It was the duty of the court, however, if in its opinion the State had made out a case, to submit it to the jury.

After an examination of the evidence we are of the opinion the court did not err in refusing to instruct the State's Attorney that if a verdict of guilty was returned, it would be set aside.

The People of the State of Illinois,

Defendant in Error,

vs.

Morris Kipnis,

Plaintiff in Error.

Error to the Circuit Court of Carroll County

Jett, J.

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Motion for a new trial was denied and the court fined the plaintiff in error Two hundred and fifty dollars on each count. This writ of error followed. The sufficiency of the indictment is not challenged.

It is urged that the court erred in refusing the motion of the plaintiff in error, at the close of the people's testimony, to instruct the State's Attorney that if a verdict of guilty was returned, it would be set aside.

The court was possessed of the authority, if at the conclusion of the evidence on the part of the prosecution it was of the opinion that the People had not made out a case to go before the State's Attorney, and to suggest to him that he would grant a new trial in the event of a verdict of guilty. It was the duty of the court, however, if in its opinion the State had made out a case, to submit it to the jury.

After an examination of the evidence we are of the opinion the court did not err in refusing to instruct the State's Attorney that if a verdict of guilty was returned, it would be set aside.

Complaint is made by plaintiff in error of the instruction given by the court defining intoxicating liquor. This instruction is in the language of the statute. We hold that it was not error to instruct the jury in the language of the law defining what constitutes intoxicating liquor.

It is insisted the court erred in refusing the instruction offered by the plaintiff in error to the effect that the presumption of innocence does not cease to operate at the conclusion of the evidence or at any time before the jury has finally determined upon a verdict. This instruction defined the law correctly, but it was covered in other instructions, and for that reason was not error to refuse it.

It is insisted that the verdict of the jury is not supported by the evidence. The testimony shows that the plaintiff in error was a dealer in rags, old iron and junk, and had a room in a livery barn which he had rented where he kept his rags, old iron and junk. A search warrant had been sworn out and a deputy sheriff, the State's Attorney and other persons went to the premises in question to search them. Concealed therein under a plank used as a drive way over a sill leading out of the building they found three bottles of intoxicating liquor. Plaintiff in error who had been present during the search, immediately after the finding of the bottles hurried away without making any explanation relative to them.

This fact of the finding of these three bottles in this barn considered in connection with other facts and circumstances developed on the trial of the case was sufficient to justify the conviction under the first count of the indictment charging an illegal possession of intoxicating liquor.

Under the fourth count of which the plaintiff in error was convicted, the evidence showed that on the day previous to the time of searching the premises and the finding of the three bottles of intoxicating liquor, he took a man into this room in the barn and gave him a drink out of a bottle. The evidence does not show that it was one of the three bottles found at the time of the

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This fact of the finding of these three bottles in this barn considered in connection with other facts and circumstances developed on the trial of the case was sufficient to justify the conviction under the first count of the indictment charging an illegal possession of intoxicating liquor.

Under the fourth count of which the plaintiff in error was convicted, the evidence shows that on the day previous to the time of searching the premises and the finding of the three bottles of intoxicating liquor, he took a man into this room in the barn and gave him a drink out of a bottle. The evidence does not show that it was one of the three bottles found at the time of the

searching of the barn, yet the testimony does show that the man to whom the drink was given, was in an intoxicated condition after having taken the drink. The evidence further discloses the fact that the bottle from which the man took a drink was similar to the ones obtained by reason of the search made of the premises; also that the man to whom the drink was given made the remark at the time of the taking the same that "it was pretty good stuff."

Plaintiff in error testified in his own behalf. He said he had never seen the liquor, and that it was not his. He stated that a day or two before his arrest he had come from Chicago; that he had bought some vegetables in Chicago, but did not remember of bringing out any intoxicating liquor.

It is the rule uniformly applied in criminal cases that the verdict of the jury will not be set aside unless the finding is so palpably against the weight of the evidence as to indicate that the verdict is based upon passion or prejudice. The People v. Karpovich, 288 Ill. 268-274; The People v. Lutzow, 240 Ill. 612.

We are not prepared to say that the verdict was based upon passion or prejudice.

After a careful examination of the facts in this case we conclude that the evidence sustains the finding of the jury and that no reversible error was committed in the trial of this cause. The judgment if the circuit court of Carroll County is affirmed.

Affirmed.

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After a careful examination of the facts in this case we conclude that the evidence sustains the finding of the jury and that no reversible error was committed in the trial of this cause. The judgment of the circuit court of Carroll County is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3536a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 7 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Kidwell Garage Co.,
a corporation,
appellant,
vs.
Lulu Huntington,
appellee,

Appeal from the Circuit Court
of Du Page County

Jett, J.

This suit was instituted by appellant against appellee in the Circuit Court of Du Page County, to recover damages for the destruction of a gasoline pump, concrete pit and resultant loss of profits from the sale of gasoline.

A jury trial was had and a verdict was returned in favor of appellant in the sum of $50.00. Appellant was not satisfied with the verdict and upon the court overruling its motion for a new trial and rendering judgment appellant excepted and prosecuted this appeal.

Appellant was conducting and maintaining a garage in the village of Downers Grove. Its business consisted of dealing in motor vehicles, automobiles, accessories, supplies, gasoline and oils. It maintained for the purpose of selling gasoline to the public a gasoline pump, which was located in front of the garage.

Appellee, Lulu Huntington, in driving an automobile known as an Oldsmobile Sedan, and when approaching the garage building of appellant struck the gasoline pump with the front end of her car knocking it down and completely destroying it, and damaged the pit to which the pump was fastened. It is insisted by appellant that the market value of the pump at the time of the destruction was $350.00, and that the cost of repairing the pit was $51.60. Appellant also claims that it was injured and damaged, because it could not sell the full amount of gasoline during a period of four days the pump was not in operation to the extent of about $37.61.

Kidwell Garage Co.,
a corporation,
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vs.
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Appellant was conducting and maintaining a garage in the village of Downers Grove. Its business consisted of dealing in motor vehicles, automobiles, accessories, supplies, gasoline and oils. It maintained for the purpose of selling gasoline to the public a gasoline pump, which was located in front of the garage.

Appellee, Lulu Huntington, in driving an automobile known as an Oldsmobile sedan, and when approaching the garage building of appellant struck the gasoline pump with the front end of her car knocking it down and completely destroying it, and damage the pit to which the pump was fastened. It is insisted by appellant that the market value of the pump at the time of the destruction was $50.00, and that the cost of repairing the pit was $31.60. Appellant also claims that it was injured and damaged, because it could not sell the full amount of gasoline during a period of four days the pump was not in operation to the extent of about $37.61.

Appellant contends that the verdict of the jury fixing its damages at $50.00 is not in keeping with the amount of damages it sustained. Appellee insists that there is no competent testimony in the record to sustain the contention of appellant over and above the amount found and fixed by the jury. It is quite evidence that the jury in assessing appellant's damages, based their verdict upon the amount it cost to repair the pit to which the pump was fastened. The question then to be determined is, is there any competent evidence in the record either as to the damage to the pump or the damage by reason of the failure to sell gasoline during the four days until a new pump was installed.

We have carefully examined the record and the testimony of appellant bearing upon the damages occasioned by the destruction of the pump is as follows:

Q Do you know the market value of this class of pumps or what it was on the 5th day of June, 1922?

A $350.00.

Q And do you know what the reasonable market value of the pump in its then condition was prior to the accident on the 5th day of June, 1922?

A No, sir.

No other testimony was offered with reference to the value of the pump immediately prior to the accident.

Appellant offered no proof as to the fair market value of the pump immediately prior to the injury and in so far as the testimony offered on behalf of the appellant the jury had no evidence before it upon which to predicate a verdict covering the damages claimed to have been sustained by reason of the destruction of the pump. We are not unmindful of the testimony given by the witness called on the part of appellee. The testimony of Ferguson called by appellee did not relate to the particular pump in question; he did not testify that he had seen this pump immediately prior to its destruction and his opinion was based upon his knowledge of pumps of that class and character taking into consideration the length of time the pump had

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been in use and that it was an old model.

We have examined the testimony bearing upon the question of the claim for damages by way of loss of profits during the period from the time the pump was destroyed to the installing of the new one. We are not prepared to say there is any competent evidence in the record on which to base a finding either as to the damage to the pump or by reason of the failure to sell gasoline until the new pump could be operated.

Moreover the verdict was approved by the trial judge. At common law new trials were not allowed on the ground that the damages allowed by the jury in actions for torts, were insufficient, and, as a general rule, a new trial will not be granted on the ground that the damages are too small, in actions for wrongs and injuries.

Bolles v. Bloomington & etc. 130 Ill. App. 263.

Hackett v. Pratt, 52 Ill. App. 340.

Hamilton v. Ry. Co. 104 Ill. App. 207.

We are of the opinion that the judgment is sustained by the evidence and it will be affirmed.

Judgment affirmed.

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Bolles v. Bloomington & etc. 180 Ill. App. 563.

Hackett v. Pratt, 32 Ill. App. 340.

Hamilton v. Ry. Co. 104 Ill. App. 207.

We are of the opinion that the judgment is sustained by the evidence and it will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb, in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson

Clerk of the Appellate Court.

(3537a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 331

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

S. & H. Motors Company,
a corporation,

appellee,

vs.

Al. S. Voight and Reed Voight,
doing business as Voight Bros.,
a copartnership,

appellants,

Appeal from the County
Court of Will County

Jett, J.

This is an action of forcible entry and detainer commenced by appellee against the appellants in a Justice of the Peace court. A trial was had before the Justice of the Peace, resulting in a finding and judgment in favor of appellants and against appellee for costs of suit.

Appellee perfected an appeal from the judgment rendered against it in the Justice court to the county court of Will county, where a jury was impanelled and a trial had. At the close of all of the evidence, the appellants requested the court to direct a verdict fof them. A motion was also entered at the same time by appellee, asking that the jury be instructed to return a verdict in its favor for the possession of the premises in question.

The court denied the motion of appellants and allowed the motion of appellee and the jury returned a verdict as directed, finding the right to the possession of the premises in appellee, upon which verdict the court rendered judgment in favor of appellee for the possession of the premises and costs of suit, after having first denied motions for a new trial and in arrest of judgment, from which judgment appellants prosecute an appeal to this court.

The principal error assigned is that the court erred in directing a verdict for appellee, appellants insisting that the evidence warrants a judgment in favor of them.

The record discloses the fact that appellants, as tenants, took possession of the premises in question on January 1, 1919, under a written lease with one A. E. Bateman, the then owner, which

S. & H. Motors Company,
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vs. Appeal from the County

Al. S. Voight and Reed Voight, doing business as Voight Bros., a copartnership, Court of Will County

appellants,

Jett, J.

This is an action of forcible entry and detainer commenced by appellee against the appellants in a justice of the peace court. A trial was had before the justice of the peace, resulting in a finding and judgment in favor of appellants and against appellee for costs of suit.

Appellee perfected an appeal from the judgment rendered against it in the justice court to the county court of Will county, where a jury was impanelled and a trial had. At the close of all of the evidence, the appellants requested the court to direct a verdict for them. A motion was also entered at the same time by appellee, asking that the jury be instructed to return a verdict in its favor for the possession of the premises in question.

The court denied the motion of appellants and allowed the motion of appellee and the jury returned a verdict as directed, finding the right to the possession of the premises in appellee, upon which verdict the court rendered judgment in favor of appellee for the possession of the premises and costs of suit, after having first denied motions for a new trial and in arrest of judgment, from which judgment appellants prosecute an appeal to this court.

The principal error assigned is that the court erred in directing a verdict for appellee, appellants insisting that the evidence warrants a judgment in favor of them.

The record discloses the fact that appellants, as tenants, took possession of the premises in question on January 1, 1919, under a written lease with one A. E. Bateman, the then owner, which

provided for a term ending December 31, 1919. During that term appellants paid the rent provided for in the lease as it became due, and in all other respects kept and performed their covenants under the lease.

Sometime in December 1919, Bateman, the landlord and Al. S. Voight, one of the appellants had a conversation relative to appellants, retaining possession after the written lease expired. Voight told Bateman that they would like to retain possession but that the lease would be a five year lease, and asked what would be done in the way of repairing the roof. Bateman agreed to give appellants a written lease for a term of five years at a rental of $80.00 per month $5.00 of which according to the testimony of appellants was to compensate Bateman for repairing the roof.

The roof was repaired and the monthly rent was paid until May 1, 1923. No written lease was executed. On March 1, 1923, Bateman served appellants with a sixty day written notice to terminate the tenancy and calling for possession of the premises on May 1, 1923.

On April 5, 1923, the premises were purchased by and conveyed to the S. & H. Motors Company, appellee. Appellee has since that time refused to receive the monthly rent tendered by appellants.

In the words of appellants, "The main question, concisely stated is whether the case, made by the record in this proceeding, constitutes a tenancy from year to year, requiring sixty days notice to terminate or whether it is some other or different kind of tenancy requiring no notice or some other kind of notice to terminate."

It will be remembered that on January 1, 1920, the original lease, under which the premises were held had terminated. If nothing more had happened and Bateman had accepted the usual rent for the month of January, 1920, the appellants would have then become, by operation of law based on the implied intent of the parties, tenants from year to year.

But something more had happened, - - the landlord had orally agreed to give, and the tenant had orally agreed to accept a written lease for a term of five years at a rental of $80 a month.

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But something more had happened, - - the landlord had orally agreed to give, and the tenant had orally agreed to accept a written lease for a term of five years at a rental of $80 a month.

That this oral agreement would prevent the creation of a tenancy from year to year is made clear in the opinion in the case of Prickett v. Ritter, 16 Ill. 96. This case is the pioneer decision in this state on the question of "holding over" and has received the support of all later cases dealing with this subject. In the opinion of that case it is said at page 97; "Where a party enters upon premises under a lease for a year or years, and holds over, it will be construed as an implied agreement for a year and from year to year. Where the lease is for any period less than a year, the holding will be construed as being for another term of the same length of time; and in all cases as upon the same terms, as to the amount of rent and the times of payment, unless there be some act of one or both of the parties to rebut such an implication."

To the same effect is the holding in Sebastian v. Hill. 51 Ill. App. 272. The oral agreement in the present case makes any implication as to the intent of the parties not only unnecessary, - - but impossible. There can be no implication that the parties intended to enter into "another term of the same length of time", for the appellants expressly stated that they would "consider nothing less than five years" and Bateman expressively agreed that they should have such a term.

It can not be seriously urged that until a written lease was executed appellants were holding under "the original lease ". The original lease had by its own terms expired on December 31, 1919, and no act of the parties could prolong it beyond that time. Bell v. Groom, 224 Ill. App. 58.

On January 1, 1920, the parties were holding under an entirely new tenancy. That new tenancy resulted from the oral agreement made in December, 1919. The Statute of Frauds prevents effect being given to the intent of the parties expressed in that agreement for the contract was one not susceptible of performance within one year. The law will erect from the ruins of that agreement a tenancy conforming with the intent of the parties as far as is possible under the Statute of Frauds.

The holdings are to the effect that under circumstances such as

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The holdings are to the effect that under circumstances such as

are disclosed by the record in this proceeding the law will create a tenancy conforming in all particulars to the intent of the parties except that the term shall be one from month to month.

In McGivern v. Parkhill, 195 Ill. App. 343, the facts were very similar to those in the case under consideration. The defendant was in possession of the premises under a written lease for one year which expired April 30, 1914. In April of that year the plaintiff orally agreed to give to the tenant a written lease for two years. On May 1, unsigned copies of the proposed lease were given to the tenant and they remained in her possession until the latter part of July, when the plaintiff served her with a thirty day notice that he had elected to terminate the tenancy. Forcible detainer being brought the circuit court directed a verdict for the plaintiff holding the premises to have been under a tenancy from month to month, and that the thirty day notice was sufficient to terminate that tenancy. The decision of the trial court was affirmed. The court among other things said in its decision; "A verbal agreement for a lease is void under the Statute and a tenant holding over under such an agreement becomes a tenant from month to month".

The rule is well established in Illinois that premises held under an oral agreement for a term of more than one year requiring the payment of monthly rent are held under a tenancy from month to month. This doctrine is so familiar that it requires no citation of authorities. The fact that the attempted oral lease was preceded by a valid written lease does not affect the operation of this rule. Creighton v. Sanders, 89 Ill. 543; Marr v. Ray, 151 Ill. 340.

It is quite evident that no tenancy other than one from month to month could have resulted from the oral agreement between the parties to this suit. It certainly is true that no rule of law will operate to defeat the purpose of the Statute of Frauds by creating a tenancy which the parties themselves could not have created under the statute.

We have carefully examined the brief and argument of appellants. We cannot subscribe to their contention. The law of this case must

are disclosed by the record in this proceeding the law will create a tenancy conforming in all particulars to the intent of the parties except that the term shall be one from month to month.

In McOiverm v. Parkhill, 195 Ill. App. 543, the facts were very similar to those in the case under consideration. The defendant was in possession of the premises under a written lease for one year which expired April 30, 1914. In April of that year the plaintiff orally agreed to give to the tenant a written lease for two years. On May 1, unsigned copies of the proposed lease were given to the tenant and they remained in her possession until the latter part of July, when the plaintiff served her with a thirty day notice that he had elected to terminate the tenancy. Forcible detainer being brought the circuit court directed a verdict for the plaintiff holding the premises to have been under a tenancy from month to month, and that the thirty day notice was sufficient to terminate that tenancy. The decision of the trial court was affirmed. The court among other things said in its decision; "A verbal agreement for a lease is void under the Statute and a tenant holding over under such an agreement becomes a tenant from month to month".

The rule is well established in Illinois that premises held under an oral agreement for a term of more than one year requiring the payment of monthly rent are held under a tenancy from month to month. This doctrine is so familiar that it requires no citation of authorities. The fact that the attempted oral lease was preceded by a valid written lease does not affect the operation of this rule. Creighton v. Sanders, 89 Ill. 543; Marr v. May, 181 Ill. 340.

It is quite evident that no tenancy other than one from month to month could have resulted from the oral agreement between the parties to this suit. It certainly is true that no rule of law will operate to defeat the purpose of the statute of frauds by creating a tenancy which the parties themselves could not have created under the statute.

We have carefully examined the brief and argument of appellants. We cannot subscribe to their contention. The law of this case must

necessarily arise from the particular facts as disclosed by this record.

We are of the opinion that whatever rights the appellants had in the premises after December 31, 1919, were acquired under the oral agreement entered into in December of that year; that no oral agreement made during the month of December could create a tenancy running to December 31, 1920; that unless the tenancy ran until December 31, 1920, appellants could not be tenants from year to year.

Under the facts as disclosed in this proceeding if appellants were not tenants from year to year they were tenants from month to month.

We conclude that the written notice served on appellants on March 1, 1923, calling for possession of the premises on May 1,1923, entitled the appellee to the possession thereof. We are therefore, of the opinion that the court below committed no error in directing a verdict for the appellee and that the judgment rendered by the trial court should be affirmed, which is done accordingly.

Affirmed.

necessarily arise from the particular facts as disclosed by this record.

We are of the opinion that whatever rights the appellants had in the premises after December 31, 1919, were acquired under the oral agreement entered into in December of that year; that no oral agreement made during the month of December could create a tenancy running to December 31, 1920; that unless the tenancy ran until December 31, 1920, appellants could not be tenants from year to year.

Under the facts as disclosed in this proceeding if appellants were not tenants from year to year they were tenants from month to month.

We conclude that the written notice served on appellants on March 1, 1923, calling for possession of the premises on May 1,1923, entitled the appellee to the possession thereof. We are therefore, of the opinion that the court below committed no error in directing a verdict for the appellee and that the judgment rendered by the trial court should be affirmed, which is done accordingly.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3538a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Kalista Moobery, et al,

appellees,

vs. Appeal from Peoria

Christopher Harrigan, et al,

appellants,

Jones, J.

Kalista Moobery, William H. Hale, Laura A. Moore, Nellie A. Davis and Nellie McHugh, appellees, herein filed a petition in the probate court of Peoria county to recover the sum of $127.25, which they claimed they erronesouly paid to the administrator of the estate of Michael Harrigan, deceased. The prayer of the petition was allowed and a judgment entered in favor of the appellees at the February term, A.D. 1921, of this court. After the expiration of the term the appellants filed in said court their petition asking that the judgment of the court be set aside.

The facts are as follows: Michael Harrigan died on the 8th day of October A.D. 1911, leaving a last will and testament in which Maggie Harrigan, Christopher Harrigan and Kate Harrigan were the only legatees and all were named executors of the will. The will was not discovered until some time after the death of the testator. In the meantime, on the 21st day of October A.D. 1911, Frank T. Miller, public administrator of Peoria county, was appointed administrator of the estate of said deceased. While said Miller was so acting as administrator he received from William H. Hale, one of the appellees herein, the money in question being interest upon two notes, one for $400 and the other for $3,000, executed by Oscar A. Hale and payable to Maggie Harrigan, Miller, at that time, believed, as did William H. Hale, that Michael Harrigan, deceased, was the owner of the notes in question. The interest was thus paid under a mistake of facts mutual to the parties. Subsequently Maggie Harrigan file a foreclosure suit in which she made all of the appellees herein parties defendant and compelled the payment

Kalista Moobery, et al,

appellees,

vs. Appeal from Peoria

Christopher Harrigan, et al,

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Jones, J.

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The facts are as follows: Michael Harrigan died on the 8th day of October A.D. 1911, leaving a last will and testament in which Maggie Harrigan, Christopher Harrigan and Kate Harrigan were the only legatees and all were named executors of the will. The will was not discovered until some time after the death of the testator. In the meantime, on the 21st day of October A.D. 1911, Frank T. Miller, public administrator of Peoria county, was appointed administrator of the estate of said deceased. While said Miller was so acting as administrator he received from William H. Hale, one of the appellees herein, the money in question being interest upon two notes, one for $400 and the other for $3,000, executed by Oscar A. Hale and payable to Maggie Harrigan. Miller, at that time, believed, as did William H. Hale, that Michael Harrigan, deceased, was the owner of the notes in question. The interest was thus paid under a mistake of facts mutual to the parties. Subsequently Maggie Harrigan file a foreclosure suit in which she made all of the appellees herein parties defendant and compelled the payment

to her of the interest due upon the notes which were determined in that proceeding to be her property.

Upon the discovery of the last will and testament of Michael Harrigan, deceased, and its admission to probate, Frank T. Miller was removed as administrator of said estate and the appellants appointed executors thereof. On July 2, 1914, the appellees filed their petition in the probate court asking for an order for the repayment to them by the executors, of the amount of interest so erroneously paid by them to said Miller alleging that the money had been paid by him to the succeeding executor upon his removal. The cause was set for hearing on July 8, 1914. On that date upon the application of Christopher Harrigan, one of the executors, the cause was continued to a later date, which date does not appear in the abstract of the record. There was a second continuance to September 11, 1914. No further steps were taken in the cause until 1921. Meantime Christopher Harrigan and Maggie Harrigan were removed as executors of said estate and Ernest J. Galbraith was appointed administrator thereof by virtue of his office as public administrator. On February 7, 1921, Galbraith consented to the entry of an order for the repayment of the funds. At the following term Christopher Harrigan and Maggie Harrigan appellants herein, filed their motion as sole surviving legatees of the estate of Michael Harrigan, deceased, in the probate court to set aside said order of the 7th day of February. The motion was denied, whereupon appellants appealed to the circuit court which affirmed the judgment of the probate court.

The grounds upon which the motion is made are set out in full in the abstract. We will consider them in the order in which they are presented. It is first said "That the petition filed herein for the allowance of said claim shows that the sum so collected as aforesaid did not belong to the estate of Michael Harrigan deceased." That is the very essence of appellees' claim. Manifestly, if the money did belong to the estate of Michael Harrigan, deceased, appellees would not be entitled to a repayment of it.

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The second ground is "that the money was collected wrongfully by said Frank T. Miller, did not belong to the estate of the said Michael Harrigan, deceased, and should not have been administered on by the said Frank T. Miller, but should have been returned at once by the said Frank T. Miller to the parties entitled to the same; that the estate of Michael Harrigan, deceased, was not entitled to any portion thereof and has not received any benefit therefrom". Here we have a complete admission by the appellants that if the money went to the estate of Michael Harrigan, deceased, then in equity and good conscience it ought to be returned to appellees. This statement however, alleges that the estate has received no benefit from said payment. Whether the estate received the benefit of the funds is immaterial if in fact the funds came to the hands of the personal representatives of the estate. The attorneys who acted for the appellants when they were executors testified that they received the money from Miller and paid it to the appellant Christopher Harrigan. Miller's check making the payment is shown in evidence. Opposed to this, there is a denial by Christopher Harrigan that he received the money. We are of the opinion that the court was amply justified in finding the fact to be that the executors received the funds so wrongfully collected by Miller.

The third ground for setting aside the order is that because the claim did not accrue to the claimants, within the lifetime of the said Michael Harrigan, deceased, it is not within the class of claims which should be allowed against his estate; that the claimants have an action at law against Frank T. Miller to collect said claim.

The petition filed herein for the order of repayment is not filed under Section 60 of Chap. 3 of Cahill's Revised Statutes of Illinois, 1923, as claimed by appellants because it was not a demand which accrued previous to the death of the testator. Neither does it rest upon an express promise made by the administrator as such, which as shown by the appellants would bind the administrator

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in his individual capacity only. It does rest upon the equitable ground that money has come to the personal representatives of the estate of Michael Harrigan, deceased, which in equity and good conscience belong to the appellees. The probate court has broad equitable powers in the settlement of claims against estates. (Simonds Probate Practice Vol. 1, page 389; Henry v. Caruthers, 196 Ill. 136). The probate court might, under its broad equitable powers, require the representatives to repay it to those to whom it belonged.

The fourth objection to the allowance of the repayment is, "That the Statute has run against said claims for the reason that there has been a discontinuance of said claims." This contention is based upon the holding in the case of Rietzell, et al, v. Miller, 25 Ill. 53, and later cases following it. It is to be observed that those cases apply when a claim against an estate is filed under Section 60 of Chapter 3 of Cahill's Revised Statutes, 1923, to enforce the liabilities of the deceased created during his life and it is held that where such a claim is filed after the day of adjustment that the claimant must have a summons issued and served upon the personal representatives to toll the running of the Statute of Limitations and unless the cause is continued regularly from term to term of the probate court, a discontinuance is worked and the cause is no longer in the court. Clearly those cases are not applicable in this case because this is not one of the claims contemplated by the statute above cited, but is a proceeding against the personal representatives to enforce the repayment of money which has wrongfully come to their hands to the persons to whom it rightfully belongs. The proof shows that the executors appeared in the probate court and moved for a continuance of the cause, within the period of limitations. The court thus acquired jurisdiction of the parties. This tolled the running of the statute.

It is further urged that the circuit court should have tried the case de novo. That is precisely what the circuit court did. The cause there tried was upon the motion to set aside the judgment,

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It is further urged that the circuit court should have tried the case de novo. That is precisely what the circuit court did. The cause there tried was upon the motion to set aside the judgment,

not upon the original petition for the order of repayment of the interest. The latter cause could only be tried de novo after the judgment had been set aside. Appellants failed in their attempt to have the judgment set aside, and no hearing was therefore had on the original petition.

It is further urged that the court erred in refusing to receive and consider propositions of law presented by the appellants. They say that the Statute provides that either party may have a jury upon the trial of a claim against an estate and that wherever a trial by jury is a matter of right that then the parties waiving a jury may as a matter of right present to the court for consideration propositions of law governing the case to be approved or rejected by the court. As stated above the cause was not tried on a claim against the estate of the deceased but upon a motion to set aside the judgment rendered upon the original petition. This case may be likened to a motion to open up or set aside a judgment by confession. Manifestly there was no right of trial by jury. The court properly refused to consider the propositions of law.

Other objections are urged but it is sufficient to say that we have considered them all and find no sufficient ground for reversing this judgment. It will therefore be affirmed.

Judgment affirmed.

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Other objections are urged but it is sufficient to say that we have considered them all and find no sufficient ground for reversing this judgment. It will therefore be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Feb. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 632

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois, Defendant In Error,	)	Error to the County
vs	)	Court of Lee County.
Elmer Roberts, Plaintiff in Error.	)	

Partlow, P. J.

The plaintiff in error, Elmer Roberts, was found guilty in the county court of Lee county upon two counts of an information, one charging illegal manufacture, and the other illegal possession of intoxicating liquor. The court did not sentence him upon the first count, but under the second count sentenced him to pay a fine of $1000.00 and costs and stand committed to the county jail until the fine and costs were paid, and to be imprisoned in the county fail for six months. To reverse this judgment a writ of error has been prosecuted.

The evidence shows that in April, 1923, a search warrant was issued to search the house of the plaintiff in error, who lived on a forty acre farm near Amboy, Illinois. The search warrant was placed in the hands of the sheriff of Lee county, and on the night of April 29, 1923, he went to the home of the plaintiff in error and attempted to search the premises. A shot was fired from the house, the officers withdrew, and the next day arrested Roberts and Laura Sherman who lived in the house. On that night they searched the premises and a small quantity of liquor was found in a concealed cellar under the house porch. A still and mash were found but neither was taken. The officers searched a corn crib and other buildings on the premises and found a few jugs and bottles containing a small quantity of intoxicating liquor. On the trial five men testified they had visited the house and had purchased intoxicating liquor from the plaintiff in error. One of

The people of the State of Illinois, defendant in error,	Error to the County
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Martlow, J. 1.

The plaintiff in error, Elmer Roberts, was found guilty in the county court of Lee County upon two counts of an information, one charging illegal manufacture, and the other illegal possession of intoxicating liquor. The court did not sentence him upon the first count, but under the second count sentenced him to pay a fine of $1000.00 and costs and stand committed to the county jail until the fine and costs were paid, and to be imprisoned in the county jail for six months. To review this judgment a writ of error has been prosecuted.

The evidence shows that in April, 1920, a search warrant was issued to search the house of the plaintiff in error, who lived on a farty acre farm near Amboy, Illinois. The search warrant was placed in the hands of the sheriff of Lee County, who on the night of April 23, 1920, he went to the home of the plaintiff in error and attempted to search the premises. A shot was fired from the house, the officers withdrew, and the next day arrested Roberts and Laura Sherman who lived in the house. On that night they searched the premises and a small quantity of liquor was found in a concealed cellar under the kitchen floor. A still was also found but neither was there. The officers searched a barn and other buildings on the premises and found a few pints and bottles containing a small quantity of intoxicating liquor. In the trial five men testified they had visited the house and had purchased intoxicating liquor from the plaintiff in error.

them testified he visited the house twenty-five or thirty times during the sixteen months prior thereto to get a little drink; that it was "moon"; and he paid $1.50 a pint. The plaintiff in error was granted a separate trial from Laura Sherman and was found guilty as above stated.

The reasons urged why the judgment should be reversed are that the search warrant was improperly issued because it was not signed by two justices of the peace and the search was in the night time; that premises other than those described in the search warrant were searched and certain exhibits were taken therefrom; that prior to the trial, plaintiff in error made a motion to have these articles illegally taken returned to him and this motion was overruled. Complaint is made as to the rulings of the court on various items of evidence, most of which are based upon the fact that the search warrant was illegally issued and that premises were searched which were not described in the warrant.

Rule 16 of this court provided that "the abstract must fully present every exception relied upon and each error alleged, and also that part of the record which supports the rulings complained of. It will be taken as accurate and to be sufficient for a full understanding of the questions presented for decision, unless the opposite party files an additional abstract, making necessary corrections and additions." In this case the complaint upon which the search warrant was issued, and the search warrant itself, do not appear in full in the abstract. Only a small portion of each is set out. It appears, however, that the search warrant was signed by a justice of the peace and a police magistrate. For this reason the warrant was sufficient. None of the articles taken from the corn crib were admitted in evidence, therefore, plaintiff in error was not injured by reason of the fact that premises were searched which were not described in the search warrant.

It is next alleged that the information is not valid

then testified he visited the Mun's twenty-five or thirty times during the sixteen months prior thereto to get a liquor action; that it was "good"; and he paid $2.50 a pint. The plaintiff in error was granted a separate trial in the Lamar Superior Court and found guilty as above stated.

The remaining error is the judgment upon an overruled ground that the search warrant was improperly issued because it was not signed by two justices of the peace as the search was in the night time; that premises other than those described in the search warrant were searched and certain exhibits were taken therefrom; that prior to the trial, plaintiff in error made a motion to have these articles illegally taken returned to him but the motion was overruled. Complaint is made as to the admission of the testimony of various items of evidence, most of which are based upon the fact that the search warrant was illegally issued and that premises were searched which were not described in the warrant.

Ante 16 of this court provides that "the constitution shall be fully present every conceivable right upon and each error alleged, and also that part of the record which supports the rulings complained of. It will be taken as known to and to be sufficient for a full understanding of the questions presented for decision, unless the opposite party files an additional statement, making necessary corrections and additions." In this case the evidence upon which the search warrant was issued, and the search warrant itself, is not before us and it is not substantial. Only a small portion of each is set out. It appears, however, that the search warrant was signed by a justice of the peace and a notary public. For this reason the warrant was sufficient. Some of the articles taken from the store with their contents in evidence, therefore, plaintiff in error was not injured by reason of the fact that premises were searched which were not included in the search warrant.

It is next alleged that the introduction of the exhibits

and that the motion to quash the same should have been sustained. The information appears in the abstract and consists of two counts. The first count alleged that the plaintiff in error did unlawfully and knowingly possess intoxicating liquor intended for use in violation of the Prohibition Act of the State of Illinois. The second count alleged that the plaintiff in error did then and there manufacture intoxicating liquor intended for use in violation of the Prohibition Act of Illinois. In support of the motion to quash it is insisted that the information is not in accordance with the rule laid down by this court in People vs. Peiscz, 226 Ill. App. 362. In that case the information alleged that the plaintiff in error did then and there unlawfully possess intoxicating liquor within prohibition territory, and we held this was not a sufficient allegation for the reason that it was the mere conclusion of the pleader. We, however, held that allegations which are substantially the same as those here recited were sufficient, and for this reason, the court was not in error in refusing to quash the information.

It is next contended that the sentence is excessive. It has been held that the question of the extent of the punishment is a question for the court and if the sentence is within the terms of ~~xxxx~~ the statute, it will not be reviewed by this court. People vs. Elliott, 272 Ill. 592.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

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The second count alleged that the plaintiff in error did then and there manufacture intoxicating liquor intended for sale in violation of the prohibition act of Illinois. In support of the motion to quash it is insisted that the prosecution is not in accordance with the rule laid down by this court in People vs. Peloos, 256 Ill. 492. In that case the information alleged that the plaintiff in error did then and there willfully possess intoxicating liquor within prohibition territory, and we held that was not a sufficient allegation for the reason that it was the mere conclusion of the pleader. We, however, held that allegations which are substantially the same as those here were sufficient, and for this reason, the court was not in error in refusing to quash the information.

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We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of April in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

R. H. Denied Apr. 2, 1924

362 1 a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Oshkosh Manufacturing Company,

Plaintiff in error,

vs.

Mutual Wheel Company,

Defendant in error,

Error to the Circuit Court of Rock Island County

Partlow, P. J.

The plaintiff in error, Oshkosh Manufacturing Company of Oshkosh, Wisconsin, hereinafter referred to as the plaintiff, began suit in the circuit court of Rock Island county against the defendant in error, Mutual Wheel Company of Rock Island, Illinois, hereinafter referred to as the defendants, to recover damages alleged to be due under a contract entered into between them. At the close of the evidence on behalf of the plaintiff the court directed a verdict for one dollar in favor of the plaintiff, and this writ of error is prosecuted to review that judgment.

The principal error urged is that the court improperly excluded evidence offered by plaintiff tending to show the damages sued for, and improperly directed the verdict. The evidence shows that on July 3, 1917, the defendant wrote plaintiff asking whether plaintiff could furnish 1000 sets of hubs on the same terms that previous hubs had been furnished. Two days later, the plaintiff replied, quoting a price of $4 per hub, and asking defendant whether it desired to place the order. The next day, the defendant telegraphed to plaintiff accepting the offer, and on the same day wrote a letter confirming the telegram. The defendant wrote plaintiff enclosing an order for the hubs, which called for the delivery of 250 sets on each of the following dates: November 20, 1917; November 30, 1917; December 10, 1917; and December 20, 1917. The plaintiff placed an order with Rothe Foundry Company for the castings to be used on the hubs, but this order was cancelled on September 17, 1917, after notice had been given by the defendant that it desired to cancel the

Oshkosh Manufacturing Company,

Plaintiff in error,

vs. Error to the Circuit Court

Mutual Wheel Company, of Rock Island County

Defendant in error,

Partlow, P. J.

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order for the hubs. On August 17, 1917, a representative of the defendant notified a representative of the plaintiff that the defendant desired to cancel the contract, but the representative of the plaintiff objected to such cancellation. On the same date the defendant wrote plaintiff referring to the conversation between their representatives, and confirming its desire to cancel the order. On the same date the plaintiff replied stating that inasmuch as it had made all arrangements for the machinery and castings, and that its foundry had already been casting these hubs, and it had spent considerable money for machinery and equipment to take care of the extra capacity, it was not in a position to cancel the order and would expect to make delivery, and that if it was not for this reason it would be very glad to cancel the order. On August 20, 1917, the plaintiff wrote to defendant stating that because of the large expense it had been put to it would not be possible for it to allow the cancellation of the order. On the same date, the defendant wired the plaintiff to discontinue the manufacture of hubs. On August 22, the plaintiff wrote the defendant in error acknowledging the telegram and letter of August 20 and again stating it had bought new machinery, spent considerable money, expected to carry out the contract, and it would be impossible to cancel the same. On August 29, the plaintiff wrote substantially the same as on August 22, and another letter to the same effect was written on September 5. On December 6, 1917, the plaintiff wrote defendant that all the hubs had been manufactured. From that time on until November 18, 1920, considerable correspondence took place between them, but it is all of substantially the same import as that above recited. On November 18, 1920, plaintiff wrote the defendant that it had made up 1190 hubs, had sold a part of them, and there was a balance due of $5884.21, which represented the actual loss to plaintiff, without anything for interest, time, or trouble and if the defendant would send a check for this amount the matter would be considered closed. Defendant replied on December 8, 1920, and denied all liability under the contract. In September, 1921, this suit was commenced. Prior to the trial, the deposition of Leach, the president

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of plaintiff, was taken and he testified that 1190 complete hubs had been manufactured on this contract; but some time later he admitted he was mistaken and that no hubs had been manufactured. It also appeared upon the trial that the factory of the plaintiff had many large orders for goods of this character, it was behind in its orders, and was not able to fill them as they were received. This evidence was offered for the purpose of tending to show that the plaintiff was not in a position to fulfill this contract even if it had not been rescinded.

The declaration consisted of two counts. The first count set out the contract, the willingness of the plaintiff to perform, the refusal of defendant to accept or pay for the goods, the notification by the defendant before the time of performance that it would not accept or pay for the goods, and that the plaintiff was thereby damaged. The second count was substantially the same as the first, except it averred that the plaintiff had manufactured 2000 hubs, had bought material and special machinery for carrying out the contract, and alleged loss of profits as an element of damage. It covered both damage for non-acceptance of the hubs manufactured and loss of profits on hubs not manufactured. It is conceded that there is no evidence showing that any hubs were in fact manufactured.

The position of the plaintiff is that it never consented to this contract being rescinded and under the law it was not required to manufacture the hubs covered by the contract, but that it had the right to treat the contract at an end for the purpose of performance and sue for its damages. On the other hand, it is the contention of the defendant that plaintiff was estopped to recover loss of profits because it had elected to continue the contract in force for all purposes and not as rescinded, and had waived any claim of loss of profits by its acts and conduct in refusing to rescind and in representing that it had made up the hubs called for in the order and by sending a statement to defendant

of plaintiff, was taken and he testified that 1190 complete tubs had been manufactured on this contract; but some time later he admitted he was mistaken and that no tubs had been manufactured. It also appeared upon the trial that the factory of the plaintiff had many large orders for goods of this character, it was behind in its orders, and was not able to fill them as they were received. This evidence was offered for the purpose of tending to show that the plaintiff was not in a position to fulfill this contract even if it had not been rescinded.

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The position of the plaintiff is that it never consented to this contract being rescinded and under the law it was not required to manufacture the tubs covered by the contract, but that it had the right to treat the contract at an end for the purpose of performance and sue for its damage. On the other hand, it is the contention of the defendant that plaintiff was estopped to recover loss of profits because it had elected to continue the contract in force for all purposes and not as rescinded, and had waived any claim of loss of profits by its acts and conduct in refusing to rescind and in representing that it had made up the tubs called for in the order and by sending a statement to defendant

for the contract price of certain hubs alleged to have been manufactured; that there was a fatal variance between the proof and the allegations of both counts of the declaration; that for this reason the offer of proof of damage was properly sustained and the verdict was properly directed. This position of the defendant is based largely upon the theory that before the plaintiff can recover it must show that at all times it was able and ready to perform.

The questions of law presented in this case have been fully considered in the case of Lake Shore & Michigan Southern Railway Company vs. Richards, 152 Ill. 59. That case was decided in 1894 and reviews all of the authorities in this state and many of them in other jurisdictions and lays down the rule applicable to the facts in this case, Since that time it has been followed by many other authorities. The opinion in that case is entirely too long to set out even in an abbreviated form, and we will state what we consider are the substantila holdings. It is there held that where one party repudiates a contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies. He may treat the contract as rescinded and recover upon the quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to make such recovery the plaintiff must allege and prove performance on his part, or a legal excuse for non-performance.

It is the last part of this rule which causes the difficulty in this case, namely, that, if he elects to keep the contract in force,

for the contract price of certain work alleged to have been warranted; that there was a total variance between the proof and the allegations of both counts of the declaration; that for this reason the offer of proof of damage was properly sustained and the verdict was properly directed. This position of the defendant is based largely upon the theory that before the plaintiff can recover it must show that at all times it was able and ready to perform.

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he must allege and prove performance upon his part, or a legal excuse for non-performance. The court in that case, however, defined what was a legal excuse for non-performance and on page 81 it is said: "It appears to be the theory of counsel for appellant, that in order to entitle the plaintiff to recover future profits under the contract, the breach by the defendant must have been of a condition precedent to be performed on its part, and which rendered the contract incapable of execution by the other, or some act or conduct on the part of the defendant amounting to a physical obstruction or prevention of performance by the plaintiff. This contention does not commend itself either upon considerations of good conscience or convenience, and it will be found not to be sustained by the weight of authority. It would seem to be inequitable, and promotive of no good purpose, to require a party to continue in the performance of a contract notwithstanding the refusal of the other party to be longer bound by it. The effect, in many cases, must be great loss to the plaintiff, without any corresponding benefit to the defendant; or, it it be ultimately held that the plaintiff is entitled to recover his expenditures and for his labor in performing, the amount to be paid by the defendant will be greatly enhanced, while the plaintiff would of necessity take the hazard of increased loss in the event of the defendant's insolvency. It would seem to be ~~reasonable and unst~~ reasonable and just upon the repudiation of the contract by one party, that the other be held justified in ceasing performance, stopping expenditure, and thus curtailing the damages which the other party would be ~~ultimately~~ ultimately liable to pay, and to permit recovery once for all of the damages that the injured party will sustain by the non-performance of the other party, the locus penitentiae being kept open until the injured party elects to treat the contract as abandoned by the other and brings suit for non-performance."

In support of this rule announced in the Richards case, the court cites many cases, among them is Cort vs. Ambergate Railway Co. 6 Eng. L. and Eq. 230, which was a case similar to this, in which there was a default under a contract for manufacture of certain chairs. In

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deciding the case, the court said: "We ar of opinion that the jury were fully justified, from the evidence, in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common ~~ensense~~, the meaning of ***** readiness and willingness must be, that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants. What more can ~~reasonably be~~ reasonable be required by the parties for whom the goods are to be manufactured? And after showing that if, after having accepted a part, the defendants resolved not to accept the balance, the effect of compelling the plaintiffs to proceed with the manufacture and tender of them would be the enhancement of the damages the defendants would be required to pay."

In Hinckley vs. Pittsburgh Steel Co., 131 U. S. 264, the contract was for the furnishing of steel rails and there was a rescission by the defendant, and the court said: "The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article, By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails, and the rule of damage applicable to the case of the refusal of the purchaser to take an existing article is not applicable to a ~~m~~case like the present."

In Haines vs. Tucker, 50 N. H, 307, the contract was for the delivery of 500 bushels of malt, and there was a rescission, and the court said that the conduct of the defendants amounted to an unqualified renouncement of the contract, and that after such renouncement, it was no longer necessary that the plaintiffs should hold themselves in readiness to perform, or to go to the trouble and expense of furnishing what had already been refused.

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In Smith vs. Lewis, 34 Conn. 634, the doctrine as announced in the Cort case was approved, and was again reaffirmed in the same case in 36 Conn. 110. In these cases the holding was that under a contract containing mutual and dependant covenants, the refusal on the part of the defendant to perform, obviated the necessity of performance or tender of performance on the part of the plaintiff after such refusal.

The same rule was announced in United States vs. Behan 110 U. S. 338; Crabtree vs. Messersmith, 19 Ia. 179; Holloway vs. Griffith, 32 Ia. 409; Dugan vs. Anderson, 36 Md. 567; Burtis vs. Thompson, 46 N. Y. 246; Howard vs. Daly, 61 N. Y. 362; Smoots case, 15 Wall. 36; Dingley vs. Oler, 117 U. S. 532.

The holding in the Richards case had been recognized in Roebling's Sons vs. Lock Stitch Fence Co., 130 Ill. 660; Kavich vs. Young, 18 Ill. 170; Grays Harbor Commercial Co. vs Turnbull, 163 Ill. App. 231; Klipstein & Company vs. Frigid Fluid Co; 148 Ill. App. 291; Stoneking vs. Long, 142 Ill. App. 203; Rice vs. Penn. Plate Glass Co., 88 Ill. App. 147; Alvey-Ferguson Co. vs. Ernest-Tosetti Co., 178 Ill. 236.

It is also held that when one party announces that he desires to repudiate the contract, that of itself is not sufficient to terminate the contract, but the option is given to the other party to determine whether he will consider the contract terminated, or whether he will keep it in force and effect to be performed. If he pursues the latter course, he must hold himself in readiness to perform the contract and if the party who repudiated demands it he has a right to have the contract completed, but if the party who repudiates the contract does not subsequently make demand for its performance the other party may have a cause of action without having first complied with the contract simply by alleging that he was ready and willing to comply.

We think this is the situation which is presented under the facts in this case, Both counts of the declaration are based upon

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the theory that the plaintiff did not agree to the contract being rescinded but took the position that the contract would remain in force and effect and plaintiff was ready to perform at any time, if called upon. There is no evidence of the defendant ever demanding the performance of the contract and, therefore, the plaintiff comes within the rule announced in the Richards case. It had a right to sue for the damages occasioned by reason of the repudiation of the contract by the defendant. The court was in error in excluding the proof of these damages and in directing a verdict of one dollar in favor of the plaintiff.

Considerable stress is placed upon the fact that plaintiff falsely announced that these hubs had all been manufactured, and later in announcing that 1190 of them had been manufactured. The evidence shows that none of them were manufactured but the fact that there was such an announcement was not sufficient to prevent the plaintiff from having the question of its damages presented to a jury, if suit was properly brought within the time provided by the statute of limitations.

The defendant has quoted various sections of the Uniform Sales Act, and cited Rubber Trading Co. vs. Manhattan Rubber Manufacturing Company, 116 Northeastern 789, which is a New York case, construing the section of the Uniform Sales Act applicable to this case and it is urged that the plaintiff did not come within the provisions of the Uniform Sales Act, or within the holdings in the New York Case. We think the Richards case is the law in Illinois, and has been the law for many years, and that the Uniform Sales Act is but an enactment into the statute of the law as it was before that ~~the~~ statute was passed, and for that reason we do not think that either the Uniform Sales Act, or the New York case, is contrary to the views herein expressed.

The judgment of the circuit court will be reversed and the case remanded.

Reversed and remanded.

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The judgment of the circuit court will be reversed and the case remanded.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of April in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

3622

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Nancy Pyle,

Appellant,

vs.

Rockford City Traction Company,

a corporation,

Appellee.

Appeal from the Circuit Court of Winnebago County.

Partlow, P. J.

Appellant, Nancy Pyle, in the circuit court of Winnebago county, began an action for personal injuries against appellee, Rockford City Traction Company; At the close of all the evidence a motion was made to direct a verdict. The motion was allowed and the court instructed the jury accordingly. From the judgment an appeal has been prosecuted, and the only error assigned is as to the correctness of this ruling.

If there was any evidence in the record fairly tending to prove the material averments of the declaration, together with the most favorable inferences that may be drawn therefrom, and such evidence, standing alone, was sufficient to sustain a verdict in favor of the plaintiff, it was the duty of the court to overrule the motion to direct a verdict and to allow the case to go to the jury. Lakeshore and Michigan Southern Railway Company vs. Richards, 152 Ill. 59; Graver Tank Works vs. O'Donnell, 191 Ill. 236; Chicago and Alton Railway Company vs. Walker, 217 Ill. 605; Libby, McNeil & Libby vs. Cook, 222 Ill. 206.

Winnebago street in the city of Rockford extends north and south and is intersected at right angles by Cherry street. There is a single street car track on Winnebago street extending south which turns to the west into Cherry street. On August 7, 1921, about six o'clock P. M. appellant was riding south on Winnebago street in a Ford roadster with her husband and infant daughter. She testified they were driving slowly beside a street car which was going south. The street car upon approaching Cherry street and just before making

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Appellant, Nancy Pyle, in the circuit court of Winnebago county, began an action for personal injuries against appellee, Rockford City Traction Company; At the close of all the evidence a motion was made to direct a verdict. The motion was allowed and the court instructed the jury accordingly. From the judgment an appeal has been prosecuted, and the only error assigned is as to the correctness of this ruling.

If there was any evidence in the record fairly tending to prove the material averments of the declaration, together with the most favorable inferences that may be drawn therefrom, and such evidence, standing alone, was sufficient to sustain a verdict in favor of the plaintiff, it was the duty of the court to overrule the motion to direct a verdict and to allow the case to go to the jury. Lakeshore and Michigan Southern Railway Company vs. Richards, 152 Ill. 59; Graver Tank Works vs. O'Donnell, 191 Ill. 236; Chicago and Alton Railway Company vs. Walker, 217 Ill. 605; Libby, McNeil & Libby vs. Cook, 222 Ill. 206.

Winnebago street in the city of Rockford extends north and south and is intersected at right angles by Cherry street. There is a single street car track on Winnebago street extending south which turns to the west into Cherry street. On August 7, 1921, about six o'clock P. M. appellant was riding south on Winnebago street in a Ford roadster with her husband and infant daughter. She testified they were driving slowly beside a street car which was going south. The street car upon approaching Cherry street and just before making

the turn, came to a stop. The husband, who was driving the automobile, stopped about the middle of the west side of the street car. No passengers got off and the husband, after waiting a brief space of time, started to cross the tracks. Just as the rear wheels of the automobile were on the track the street car started, struck the automobile, turned it upside down and threw the appellant and her baby upon the pavement under the automobile. She testified that when her husband started the automobile across the track the street car was standing still and she did not see it start. On cross examination she testified that the fromt end of the street car had just started to make the turn into Cherry street as it came to a stop, and that the street car track began to turn about where the north side of the sidewalk line of Cherry street if extended easterly would cross Winnebago street, that the street car stopped about four or five feet north of the sidewalk line, and the front end of the street car was about to go around the curve when it stopped. Roy F. Lomax testified that he was just north of Cherry Street going south on Winnebago street following the automobile driven by Pyle and was about twenty-five feet behind it at the time of the accident. His car was near the rear end of the street car which stopped where the track commenced to turn onto Cherry street. When the car stopped Pyle stopped his automobile about even with the front steps on the right side of the car. Pyle then started his automobile and as the rear of the automobile passed over the track the street car started, hit the automobile and turned it over. The street car stopped on the verge of the turn into Cherry street about even with the north sidewalk line on Cherry street if the line was extended across Winnebago street, that when the street car started the fromt end of the automobile had crossed onto the track, that there was no signal given by the street car. On cross examination Lomax testified that he and Pyle were on the west side of the street car track about half way between the west curb and the west rail of the street car track, that there was nothing between him and the street car to obstruct his view, that he stood still while the street car

the turn, came to a stop. The husband, who was driving the automobile, stopped about the middle of the west side of the street car. As passengers got off and the husband, after waiting a brief space of time, started to cross the tracks. Just as the rear wheels of the automobile were on the track the street car started, struck the automobile, turned it upside down and threw the appellant and her baby upon the pavement under the automobile. She testified that when her husband started the automobile across the track the street car was standing still and she did not see it start. On cross examination she testified that the front end of the street car had just started to make the turn into Cherry street as it came to a stop, and that the street car track began to turn about where the north side of the sidewalk line of Cherry street if extended easterly would cross Winnebago street, that the street car stopped about four or five feet north of the sidewalk line, and the front end of the street car was about to go around the curve when it stopped. Roy F. Lomax testified that he was just north of Cherry street going south on Winnebago street following the automobile driven by Pyle and was about twenty-five feet behind it at the time of the accident. His car was near the rear end of the street car which stopped where the track commenced to turn onto Cherry street. When the car stopped Pyle stopped his automobile about even with the front steps on the right side of the car. Pyle then started his automobile and as the rear of the automobile passed over the track the street car started, hit the automobile and turned it over. The street car stopped on the verge of the turn into Cherry street about even with the north sidewalk line on Cherry street if the line was extended across Winnebago street, that when the street car started the front end of the automobile had crossed onto the track, that there was no signal given by the street car. On cross examination Lomax testified that he and Pyle were on the west side of the street car track about half way between the west curb and the west rail of the street car track, that there was nothing between him and the street car to obstruct his view, that he stood still while the street car

was at the intersection. George Bubser testified he was just coming out of his house about two hundred feet from where the accident occurred and he heard no bell or gong, the first he heard was the crash.

On behalf of the appellee Mrs. D. A. Fullerton testified she was riding on the street car on the west side. She noticed the automobile come alongside the street car. The street car started to turn into Cherry street and ran into the automobile, that she could not see the front of the car but she saw the collision. The front end of the street car hit the automobile on the left side. The automobile did not slacken its speed before the impact. The automobile was going faster than the street car. The street car did not increase its speed but slowed down. She did not know how far the street car had gone around the curve on Cherry street before the collision took place but it had not made much of a turn, the street car had just begun to make the curve when it struck the automobile. The automobile did not turn to the right or left. It went straight along the street and was headed straight south immediately before the accident. Ivan Blake testified he was riding in the fourth seat of the street car on the west side. When they got to the curve the automobile was beside the street car going at a pretty good speed. The street car slackened speed to make the curve but the automobile did not slacken speed. The street car hit the automobile just as it was going across the track. The automobile did not stop at any time neither did the street car. James McDonald, the motorman, testified that when he approached the curve he slowed down.. The automobile came alongside and hit the step of the street car. He did not see the automobile until it hit. The driver of the automobile circled around the front end of the street car. He testified he gave no signal before he started around the curve, that he was going about two and half or three miles per hour down to Cherry street and continued at that speed until he reached the curve when he started to increase the speed so as to enter the curve, that the accident occurred before he turned the street car into the curve. The street car did not go more than a foot and a half after the automobile hit

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the street car. The automobile was going fifteen to twenty miles an hour when it hit the street car. Ernest Lombard, conductor of the street car, testified he saw the automobile go past the street car and he gave one bell to stop the car. Just then the automobile hit the front end of the street car. It hit the street car just as he rang the bell. The street car had just turned on the curve when he first saw the automobile. The street car moved only four or five feet before the collision and stopped about the beginning of the curve. He saw the rear end of the automobile hit the front step of the street car. When he rang the bell the street car stopped within four feet.

The declaration charged general negligence and alleged that the plaintiff in error was in the exercise of due care. The question is whether there is evidence fairly tending to show that the servants of appellee were guilty of any negligence, and that appellant was in the exercise of due care. There is very little evidence fairly tending to support the charge of negligence. The accident occurred in broad daylight. The street car was traveling on its own track and was not going at an excessive rate of speed. There is some conflict as to whether or not it stopped just before making the curve into Cherry street. When it did start to make the curve it is undisputed that it was traveling slowly. The automobile was at no time far enough south for the motorman to see it. The only possible basis of negligence was that the motorman did not sound his gong before making the turn. In many cases this might be such an act of negligence as to necessitate the submission of the case to a jury, but we do not think that is true in this case. We therefore conclude that there was very little if any evidence tending to support the charge of negligence and that there was not enough to sustain in a verdict if one had been rendered. Neither do we think the evidence shows that the appellant was in the exercise of due care. The negligence of the husband cannot be imputed to her but she was responsible for her own negligence, and if her own negligence contributed to her injury she cannot recover. One who voluntarily rides in an automobile as the guest of the driver is not relieved of the duty of exercising ordinary care, and where the passenger has equal opportunity with the driver to observe the danger, it is his duty to

the street car. The automobile was going fifteen to twenty miles an hour when it hit the street car. Ernest Lombard, conductor of the street car, testified he saw the automobile go past the street car and he gave one bell to stop the car. Just then the automobile hit the front end of the street car. It hit the street car just as he rang the bell. The street car had just turned on the curve when he first saw the automobile. The street car moved only four or five feet before the collision and stopped at the beginning of the curve. He saw the rear end of the automobile hit the front step of the street car. When he rang the bell the street car stopped within four feet.

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warn the driver, and if he does not do so he is guilty of negligence. Flynn vs. Chicago City Ry. Co., 250 Ill. 460; Opp vs. Pryor, 294 Ill. 538; Grifenham vs Chicago Ry. Co., 299 Ill. 590; Fredericks vs. Chicago Railways Co. 208 Ill. App. 172. The appellant testified she was familiar with the intersection where the accident occurred. She knew the track curved into Cherry street and that the street car would make the turn. No passengers were waiting at the corner to get on and no passengers got off. Whether the car stopped or merely slowed down, she knew that at any minute it would start again. Notwithstanding these facts, which were equally apparent to appellant and her husband, they attempted to pass in front of the car and did not succeed. There may be some slight evidence to support the allegations of the declaration, but we think the court was within its legal rights in direction a verdict in favor of the appellee.

For these reasons the judgment will be affirmed.

Judgment affirmed.

were the driver, and if he does not do so he is guilty of negligence. Flynn vs. Chicago City Ry. Co., 250 Ill. 460; Cop vs. Ibid., 294 Ill. 538; Griffenhem vs Chicago Ry. Co., 299 Ill. 590; Wiesenicke vs. Chicago Railways Co. 208 Ill. App. 172. The appellant testified she was familiar with the intersection where the accident occurred. She knew the track curved into Cherry street and that the street car would make the turn. No passengers were waiting at the corner to get on and no passengers got off. Whether the car stopped or merely slowed down, she knew that at any minute it would start again. Notwithstanding these facts, which were equally apparent to appellant and her husband, they attempted to pass in front of the car and did not succeed. There may be some slight evidence to support the allegations of the declaration, but we think the court was within its legal rights in directing a verdict in favor of the appellee.

For these reasons the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of April in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

(3623)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 632

BE IT REMEMBERED, that afterwards, to-wit: On FEB 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Farmers National Bank of Princeton,
Illinois,
appellee,

vs.

Anson Rosenkrans,
appellant,

Appeal from the Circuit
Court of Bureau County.

Partlow, P.J.

Appellee, Farmers National Bank of Princeton, Illinois, obtained judgment by confession in the circuit court of Bureau county against T. Clyde Strait, Anson Rosenkrans and Mrs. T. Clyde Strait, upon a judgment note for $5000 dated April 12, 1921. Appellant, Anson Rosenkrans, filed a motion to open up the judgment with leave to plead. The judgment was opened and appellant filed a verified plea denying that he made or executed the note, which plea concluded to the country. Appellee filed a similiter to the plea. On the trial appellee did not attempt to prove that the signature of appellant was genuine but offered evidence to prove a ratification of the signature and that appellant by his conduct was estopped from denying the signature. Appellant testified the signature was not genuine, five witnesses testified that in their opinion it was not his signature, and fifteen genuine checks signed by appellant were admitted in evidence for the purpose of comparison. At the close of all the evidence appellant moved to instruct the jury to find the issues in his favor on the ground that there was no evidence that he signed the note, or that he authorized anybody to sign it for him. The court overruled the motion, the jury returned a verdict in favor of appellee, judgment was rendered for $5858.75, and from that judgment this appeal was prosecuted.

The evidence shows that Mrs. T. Clyde Strait, who was the wife of T. Clyde Strait, was the daughter of appellant, who lived at Paw Paw, Lee county, Illinois, about forty miles from Princeton, Illinois. Strait and his family lived on a farm near the village

Farmers National Bank of Princeton,

Illinois,

appellee,

vs. Appeal from the Circuit

Anson Rosenkrans, Court of Bureau County.

appellant,

Partlow, P.J.

Appellee, Farmers National Bank of Princeton, Illinois, obtained judgment by confession in the circuit court of Bureau county against T. Clyde Strait, Anson Rosenkrans and Mrs. T. Clyde Strait, upon a judgment note for $5000 dated April 14, 1931. Appellant, Anson Rosenkrans, filed a motion to open up the judgment with leave to plead. The judgment was opened and appellant filed a verified plea denying that he made or executed the note, which plea concluded to the country. Appellee filed a similiter to the plea. On the trial appellee did not attempt to prove that the signature of appellant was genuine but offered evidence to prove a ratification of the signature and that appellant by his conduct was estopped from denying the signature. Appellant testified the signature was not genuine, five witnesses testified that in their opinion it was not his signature, and fifteen genuine checks signed by appellant were admitted in evidence for the purpose of comparison. At the close of all the evidence appellant moved to instruct the jury to find the issues in his favor on the ground that there was no evidence that he signed the note, or that he authorized anybody to sign it for him. The court overruled the motion, the jury returned a verdict in favor of appellee, judgment was rendered for $5858.75, and from that judgment this appeal was prosecuted.

The evidence shows that Mrs. T. Clyde Strait, who was the wife of T. Clyde Strait, was the daughter of appellant, who lived at Paw Paw, Lee county, Illinois, about forty miles from Princeton, Illinois. Strait and his family lived on a farm near the village

of LaMoille, which was about half way between Princeton and Paw Paw. On April 13, 1931, appellee held several notes against Strait and wife amounting to $4144.50 for money loaned. Strait applied to appellee to increase the debt to $5000, stating that he would give the appellee a new note and have his wife and appellant sign as security. On that date a judgment note for $5000 due six months after date was drawn and delivered to Strait. On the following day Strait returned to the bank with the note and it appeared to be signed by Strait first, appellant second, and Mrs. Strait third. Upon the delivery of the note the appellee cancelled and delivered to Strait the old notes and placed to his credit in the checking account $853.50. On August 29, 1931, appellee received a letter from Strait asking for a renewal of the note until the following December at which time he promised to pay $2500. On the same date this letter was received from Strait, appellee wrote to appellant informing him that it held a note for $5000 signed by him and Mr. and Mrs. Strait, which note would be due October 13, and that the appellee had received word from Strait asking for a renewal of the note until December, at which time he would pay $2500, and stating that if it was satisfactory to appellant the bank would grant the extension. On the next day, August 30, 1931, appellant went to the bank and had a talk with L. R. Davis, the president, and A. W. Anderson, the cashier, in which appellant stated that his name had been forged to the note. There was considerable discussion between the parties with reference to the seriousness of the charge and the effect it would have upon Strait and his family. Appellant offered appellee $2000 to surrender the note, which was refused. He then offered $3000 which was also refused. The officers of appellee then suggested that the bank would be willing to take a note for $5000, due in two years, signed by appellant securing the payment of the forged instrument. After further discussion appellant agreed to execute this note and it is claimed by appellee that it was then agreed that both notes should be held by appellee and that appellee was to collect from Strait what-

of LaMotte, which was about half way between Princeton and Paw Paw. On April 12, 1921, appellee held several notes against Strait and wife amounting to $4144.50 for money loaned. Strait applied to appellee to increase the debt to $5000, stating that he would give the appellee a new note and have his wife and appellant sign as security. On that date a judgment note for $5000 due six months after date was drawn and delivered to Strait. On the following day Strait returned to the bank with the note and it appeared to be signed by Strait first, appellant second, and Mrs. Strait third. Upon the delivery of the note the appellee cancelled and delivered to Strait the old notes and placed to his credit in the checking account $853.50. On August 29, 1921, appellee received a letter from Strait asking for a renewal of the note until the following December at which time he promised to pay $5500. On the same date this letter was received from Strait, appellee wrote to appellant informing him that it held a note for $5000 signed by him and Mr. and Mrs. Strait, which note would be due October 12, and that the appellee had received word from Strait asking for a renewal of the note until December, at which time he would pay $5500, and stating that if it was satisfactory to appellant the bank would grant the extension. On the next day, August 30, 1921, appellant went to the bank and had a talk with L. R. Davis, the president, and A. W. Anderson, the cashier, in which appellant stated that his name had been forged to the note. There was considerable discussion between the parties with reference to the seriousness of the charge and the effect it would have upon Strait and his family. Appellant offered appellee $2000 to surrender the note, which was refused. He then offered $3000 which was also refused. The officers of appellee then suggested that the bank would be willing to take a note for $5000, due in two years, signed by appellant securing the payment of the forged instrument. After further discussion appellant agreed to execute this note and it is claimed by appellee that it was then agreed that both notes should be held by appellee and that appellee was to collect from Strait what-

ever amounts could be secured, and any payments made should be endorsed upon both notes. There is some dispute as to whether it was at that time agreed that the question of this forgery should be kept a secret so as not to injure Strait and his family. A note for $5000, dated August 30, 1931, due in two years, was then prepared and was signed by the appellant. After the judgment clause was the following:- "This note is given to secure a note and any renewals thereof dated April 13, 1931, due six months after date, signed T. Clyde Smith, Anson Rosenkrans and Mrs. T. Clyde Strait."

Strait did not pay $2500 in December, and shortly before January 1, 1932, made a sale of all his property and removed with his family from the state. From August 30, 1931, to April 18, 1932, there was some correspondence between appellee and appellant with reference to the note, but after Strait and his family left the state appellant notified appellee that he considered the incident closed and he was not liable to appellee in any amount. Upon the announcement by appellant that he was not liable on the note, the original note was placed in judgment as above stated.

The principal reason urged by appellant why this judgment should be reversed is that the declaration alleged that appellant was the maker of the note, which was denied in appellant's sworn plea, that for this reason the only question at issue under the pleadings was whether appellant signed the note and whether the signature of appellant on the note was genuine. It is also claimed the court improperly admitted evidence of ratification and estoppel when neither had been pleaded; and for these reasons the court should have sustained appellant's motion, at the close of all the evidence, to direct a verdict in his favor.

We think appellant is not correct in this position. The declaration was the form usually used in taking judgments by confession, and alleged that the appellant made, executed and delivered the note. Appellant filed a verified plea denying the execution of the note, which plea without verification concluded to the country. To maintain

ever amounts could be secured, and any payments made could be endorsed upon both notes. There is some dispute as to whether it was at that time agreed that the question of this forgery should be kept a secret so as not to injure Strait and his family. A note for $3000, dated August 30, 1921, due in two years, was then prepared and was signed by the appellant. After the judgment clause was the following:- "This note is given to secure a note and any renewals thereof dated April 13, 1921, due six months after date, signed T. Clyde Smith, Anson Rosenkrans and Mrs. T. Clyde Strait."

Strait did not pay $3000 in December, and shortly before January 1, 1922, made a sale of all his property and removed with his family from the state. From August 30, 1921, to April 13, 1922, there was some correspondence between appellee and appellant with reference to the note, but after Strait and his family left the state appellant notified appellee that he considered the incident closed and he was not liable to appellee in any amount. Upon the announcement by appellant that he was not liable on the note, the original note was placed in judgment as above stated.

The principal reason urged by appellant why this judgment should be reversed is that the declaration alleged that appellant was the maker of the note, which was denied in appellant's sworn plea, that for this reason the only question at issue under the pleadings was whether appellant signed the note and whether the signature of appellant on the note was genuine. It is also claimed the court improperly admitted evidence of ratification and estoppel when neither had been pleaded; and for these reasons the court should have sustained appellant's motion, at the close of all the evidence, to direct a verdict in his favor.

We think appellant is not correct in this position. The declaration was the form usually used in taking judgments by confession, and alleged that the appellant made, executed and delivered the note. Appellant filed a verified plea denying the execution of the note, which plea without verification concluded to the country. To maintain

the issue made by the pleadings, the appellee was only required to prove that appellant was liable as maker of the note. The burden was upon appellee to make out a prima facie case for the introduction of the note. It could do so by showing that appellant executed the note originally, or that after its execution, even by someone other than himself without authority, he ratified or adopted the note, or made payments thereon, thus making it his genuine note from the beginning. This is the law in this State and is sustained by a long line of authorities. Walters v. Trustees of Schools, 13 Ill. 63; Hafner v. Vandolah, 63 Ill. 483; Hafner v. Dawson, 63 Ill. 488; Melvin v. Hodges, 71 Ill. 428; Goodspeed v. Cutler, 75 Ill. 534; Paul v. Berry, 78 Ill. 158; Lotzeman v. Howell, 20 Ill. App. 588; Hirster v. Strehmann, 232 Ill. App. 593.

The next question is whether or not the evidence admitted tending to show ratification was sufficient to make appellant liable for the payment of the forged note. It must be conceded that appellant did not sign this note. He repudiated it from the beginning. He first offered $2000 for its surrender. He then offered $3000. Both offers were refused. These offers were not agreements to pay and did not constitute a ratification. Appellee then suggested that appellant sign a new note for $5000 due in two years, securing the payment of the forged note or any renewal thereof, and the new note was executed. In connection with this new note it was agreed that appellee should collect from Strait what he could on the forged note and any payments made were to be credited on both notes. The fact that nothing was collected or credited does not change the effect of the agreement. Any balance due was to be paid by appellant on the new note. He did not recognize or ratify the forgery. He expressly repudiated it. He executed his own note in lieu thereof, and by so doing made himself personally liable to pay the $5000, not upon the forged note, but upon the note which he personally executed. For this reason the evidence admitted did not show a ratification of the forged note so as to make the appellant personally liable thereon, but the evidence did show that a new note was given by appellant and

the issue made by the pleadings, the appellee was only required to prove that appellant was liable as maker of the note. The burden was upon appellee to make out a prima facie case for the introduction of the note. It could do so by showing that appellant executed the note originally, or that after its execution, even by someone other than himself without authority, he ratified or adopted the note, or made payments thereon, thus taking it his genuine note from the beginning. This is the law in this State and is sustained by a long line of authorities. Walters v. Trustees of Schools, 18 Ill. 53; Hafner v. Vandolah, 62 Ill. 483; Hafner v. Dawson, 65 Ill. 482; Melvin v. Hodges, 71 Ill. 488; Goodspeed v. Outler, 78 Ill. 534; Paul v. Berry, 78 Ill. 158; Lotzeman v. Howell, 80 Ill. App. 338; Hirster v. Strehmann, 222 Ill. App. 592.

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upon this new note his liability must be based.

Complaint is made of the giving and refusing of instructions and the admission and exclusion of evidence, but it will not be necessary to consider any of these questions.

For the error indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

upon this new note his liability must be based.

Complaint is made of the giving and refusing of instructions and the admission and exclusion of evidence, but it will not be necessary to consider any of these questions.

For the error indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of Mar in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

R. H. Denied apr 2, 1924

3624

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

William Johnson,

appellee,

vs.

The City of Galva,

appellant,

Appeal from the Circuit Court of Henry County.

Partlow, P.J.

Appellee, William Johnson, began suit in the circuit court of Henry county against appellant, the City of Galva, to recover damages for the pollution by the sewage of appellant of a certain creek or natural water course extending across the lands of appellee. There was a trial by a jury and a verdict in favor of appellee for $4000. The court required a remittitur of $1500, judgment was rendered for the balance, and this appeal followed.

The evidence shows that appellee was the owner of 112 acres of land, partly within and partly adjacent to the city of Galva. The land consisted of three forty acre tracts, joining each other north and south, except that eight acres of the north forty had been sold. The north thirty-two acres were in the corporate limits of the city, and on this land was appellee's dwelling house in which he lived with his family. The south fifty-five acres were used as a meadow and pasture lands on which appellee pastured his horses, cows and other stock. Running across the pasture was a creek, or natural water course, and appellee claims that in this creek there continuously flowed a stream of clear pure water affording ample water for his stock. The appellant, a municipal corporation of about 3500 population, on October 1, 1912, constructed a sewage system. The south portion of the system accomodated the south and east part of the city and through it the sewage from the business houses and dwellings of about 1500 people was emptied. It extended in a southwesterly direction to the creek where it entered the lands of appellee. The appellee claims that it was the duty of the appellant to prevent the sewage from emptying into the creek, but that appellant unlawfully intending to injure the

William Johnson,

appellee,

vs.

The City of Galva,

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appellee and annoy him and his family, wrongfully permitted sewage in large quantities and in a natural state to empty into the creek, thereby contaminating and polluting the water and rendering it unfit for the stock to drink, and that some of the stock did drink the water and became sick, diseased and died; that the value of appellee's land was greatly depreciated, the use and enjoyment thereof greatly hindered and limited, his business was injured and rendered less beneficial, and he was deprived of certain profits which he might have derived had the water been permitted to remain in a natural state and condition. He claims that noxious smells and stench issued from the stream which stenches were carried into the dwelling house rendering the same uncomfortable and unfit for habitation, and that he was thereby, and still is, greatly annoyed and discommoded in the possession, use and enjoyment of the premises.

The evidence further shows that the various lines of the sewer were brought together at a settling tank and filtering bed, near the southern limits of the city. After passing through the tank and bed, it entered an open ditch and then entered a tile across the Boyd lands to a point near the east line of appellee's lands, where this line of tile was joined by another line which drained the Boyd lands and other lands. The surface drainage from a portion of the city and surrounding territory passed through these tiles. The main tile had its outlet at the east line of appellee's farm through a concrete abutment into the creek that ran in a northwesterly direction across appellee's farm. All the lands east of the appellee's farm were in cultivation and there was no open ditch east of his lands.

It is claimed by appellant that there never was a continuous flow of pure water through this creek at any time even when the lands above appellee's farm were boggy; that for the greater part of the year, particularly from May to November, there was no water in the creek except immediately after a rain and then only for a short time. The creek did not furnish sufficient water for live stock grazing on

appellee and annoy him and his family, wrongfully permitted sewage in large quantities and in a natural state to empty into the creek, thereby contaminating and polluting the water and rendering it unfit for the stock to drink, and that some of the stock did drink the water and became sick, diseased and died; that the value of appellee's land was greatly depreciated, the use and enjoyment thereof greatly hindered and limited, his business was injured and rendered less beneficial, and he was deprived of certain profits which he might have derived had the water been permitted to remain in a natural state and condition. He claims that noxious smells and stench issued from the stream which stenches were carried into the dwelling house rendering the same uncomfortable and unfit for habitation, and that he was thereby, and still is, greatly annoyed and disaccommoded in the possession, use and enjoyment of the premises.

The evidence further shows that the various lines of the sewer were brought together at a settling tank and filtering bed, near the southern limits of the city. After passing through the tank and bed, it entered an open ditch and then entered a tile across the Boyd lands to a point near the east line of appellee's lands, where this line of tile was joined by another line which drained the Boyd lands and other lands. The surface drainage from a portion of the city and surrounding territory passed through these tiles. The main tile had its outlet at the east line of appellee's farm through a concrete abutment into the creek that ran in a northwesterly direction across appellee's farm. All the lands east of the appellee's farm were in cultivation and there was no open ditch east of his lands.

It is claimed by appellant that there never was a continuous flow of pure water through this creek at any time even when the lands above appellee's farm were boggy; that for the greater part of the year, particularly from May to November, there was no water in the creek except immediately after a rain and then only for a short time. The creek did not furnish sufficient water for live stock grazing on

the land. Appellee did not depend on the creek for his water supply, but secured his water from a well near his residence on the north end of the property. Appellant also claims that appellee's house was more than half a mile from the creek and was too far away to be reached by any odor that might arise from the sewage; that there had been no material change in the amount of sewage that had been going through the creek for the past eleven years.

It is admitted by appellant that it discharged a portion of its sewage through the filtering tank which was intended as far as possible to purify the sewage, and that after passing partly through an open ditch and a tile, this sewage emptied upon the lands of appellee; that appellant had a right to maintain its sewage system and discharge its sewage at a suitable place; that if in doing so it injured the appellee, it was liable for the damages sustained but that it was not liable for punitive damage; that the discharge of sewage upon the lands of appellee may have constituted a technical trespass so as to entitle appellee to nominal damages but that no substantial damages could be awarded; that the evidence which appellee was permitted to offer upon the question of damages did not constitute the proper measure, and it is impossible to say what verdict a jury would have returned under proof of proper damages; that it was the duty of appellee to mitigate the damages by building a fence on both sides of the ditch at a cost of $160, and this was the full measure of his damages.

Appellee had the right to have this stream of water flow in its natural state, with its quality unaffected. This was a right of which he could not be deprived except by due process of law. Tetherington v. Donk Bros., 232 Ill. 522; Thomas v. Ohio Coal Company, 199 Ill. App? 50. If the appellant deposited upon the lands of the appellee sewage which was offensive and injurious to his property, that constituted a nuisance for which an action would lie against the appellant. C. & E. I. R.R. Co. v. Loeb, 118 Ill. 203; Wylie v. Elwood, 134 Ill. 281; City of Jacksonville v. Doan, 145 Ill. 23. The mere

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Appellee had the right to have this stream of water flow in its natural state, with its quality unaffected. This was a right of which he could not be deprived except by due process of law. Tetherington v. Donk Bros., 233 Ill. 533; Thomas v. Ohio Coal Company, 199 Ill. App. 50. If the appellant deposited upon the lands of the appellee sewage which was offensive and injurious to his property, that constituted a nuisance for which an action would lie against the appellant. C. & E. I. R.R. Co. v. Loeb, 118 Ill. 203; Wylie v. Elwood, 134 Ill. 281; City of Jacksonville v. Doan, 145 Ill. 23. The mere

fact that the damages may be difficult to ascertain is no reason why damages should not be allowed. Daughettee v. Ohio Oil Co., 263 Ill. 518. Whether the damages sustained were the natural and probable consequences of the appellant's wrongful act was a question of fact for the jury. Chapman v. Kirby, 49 Ill. 211; Chicago Union Traction Co. v. May, 221 Ill. 530; Thompson v. Marks, 186 Ill. App. 92.

It makes no difference as far as the right of action of appellee is concerned whether the stream had water in it all the year or not. The appellee had the right to the use and enjoyment of the water during such portion of the year as there was water in the creek. If he was deprived of the use of this water, and could not use his land, and was put to inconvenience and expense in handling his stock, a cause of action arose against the appellant.

The damage was caused by reason of the fact that the settling tank did not perform its function. The mere fact it had been in this condition for about eleven years would not change appellee's right of action for any damages which occurred within the five years period of the Statute of Limitations. This was not a permanent nuisance but it was only temporary for which successive suits might be brought. Possibly some of the damages might have been avoided by the building of a fence. This question was, however, submitted to the jury by appellant and the court admitted evidence to show the cost of building a fence, and gave instructions on that question. The jury passed upon the question of the fence and rendered its verdict accordingly. While some of the damages might have been prevented, or at least lessened, by the building of a fence, all of them could not have been avoided. The building of a fence would not prevent the sewage from flowing onto the lands of the appellee and creating a nuisance from which offensive odors would arise. This was an element of damage which the appellee had a right to submit to a jury. If these odors caused any inconvenience to the appellee and any damage resulted thereby, or he was put to any inconvenience or expense in the handling of his lands, that also was a proper question to be submitted to the jury and it was so submitted.

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The appellant complains of the elements of damage which appellee was permitted to prove. Appellee claims $750 for the death of three horses from lockjaw, because of their coming in contact with this sewage. He claimed he was required to keep his stock in the barnyard and had to feed them during the summer months when they could otherwise have been on pasture, and as a result he fed twenty tons of haw at $20 per ton, and 100 bushels of corn at fifty cents per bushel, which he would otherwise not have been compelled to feed, making a total of $450. That the cows shut up in the barnyard only gave about one-half as much milk as they would have given had they been permitted to run on the pasture, making a difference of thirty to thirty-five quarts per day, amounting to $3 to $3.50 per day for five months each year, approximating $450. per year. That he left his horses in the pasture and watered them at the barn, and it was necessary to drive them back and forth to water every morning and night, and this required extra help costing $125 per year, in addition to his own work in that connection. That the odors from the ditch were carried to the barn by the hogs, were very offensive, and that the odors were carried into the dwelling house making it very disagreeable.

It is contended by appellant that these elements of damage were not sufficient to sustain the verdict, and each of these items is argued separately. We do not consider it necessary to consider each of them in detail. We deem it sufficient to say that some of them are established by the evidence and some are not. If horses died from lockjaw as a result of coming in contact with this sewage, we think this was an element of damage, which, if properly proven, might have been recovered. It may be the evidence is not sufficient to show that any of these horses died as the result of this nuisance. It may also be true that the question of the amount of milk which the cows gave was speculative in character, and not sufficient on which to base a verdict. The damages awarded covered a period of five years at the rate of $500 per year. We cannot say the verdict is contrary to the evidence. We think there is sufficient evidence

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to justify the verdict even though some items were not sustained by the evidence. Therefore we do not feel disposed to disturb the judgment on the ground that it is not sustained by the evidence.

Complaint is made by appellant that these items as proven were not the measure of damages. Appellee propounded questions adopting as the measure of damages the depreciation in the value of the lands. This was objected to by appellant. Evidence was then introduced on the theory that the appellee was entitled to recover such damages as the evidence showed he had sustained by reason of the wrongful action of the appellant. The case was apparently tried upon this theory and instructions were submitted covering those elements of damages. It has been held that where the measure of damages was acquiesced in by the complainaing party, its correctness cannot be questioned on review. Toberman v. T. St. L. & W. R. R. Co., 159 Ill. App. 300; Levy & Hipple Motor Co. v. City Motor Cab Co., 174 Ill. App. 30. Under this state of the proof appellant is in no position to question the measure of damages in this case.

Complaint is made of certain evidence by the representative of the State Board of Health to the effect that he had gone over the creek and had notified the appellant of the condition of the sewage passing through it; that the court improperly permitted witnesses to testify that sewage was likely to contain dangerous germs, without any showing that anybody was affected thereby; and that the court in its instructions should not have referred to the declaration. We do not think there is any special objection to the admission of this evidence or the giving of these instructions.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

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We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of April in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

R. H. Denied Apr 2, 1924

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 633

BE IT REMEMBERED, that afterwards, to-wit: On FEB 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Ralph K. Jewett,

appellee,

vs.

Harlan Shepardson,

appellant,

Appeal from the Circuit Court of Winnebago County.

Partlow, P.J.

Appellee, Ralph K. Jewett, began an action of trespass on the case on promises in the circuit court of Winnebago county against appellant, Harlan Shepardson. There was a trial by jury and a verdict in favor of appellee for $2117. The court required a remittitur of $617, judgment was rendered for the balance, and this appeal followed.

On November 3, 1921, a written contract was entered into between appellant and appellee which provided that appellee, for $1600, was to clear forty acres of timber land for appellant ready for the plow not later than June 1, 1922. Appellee was to have all the wood on the land, and was to be paid $500 within ten days after he had commenced work with a good force of men, $300 in about three weeks after the first payment, and the balance of $800 when the work was completed. It appears that on the date the contract was entered into a portion of this forty acres, variously estimated at between ten and twenty acres, had already been cleared. Shortly after the contract was executed, appellee with a force of colored men started to work and continued for over seven months, and the $500 and $300 payments were made when due. As the work progressed appellee sold appellant two mules for $225, and some hogs for $398. There were some credits on these amounts, but appellant admitted $398.50 was unpaid. Appellee claims he cut 31864 feet of logs, worth $25 per thousand, amounting to $796, and 260 cords of wood worth $6 per cord, amounting to $1560. The work was not completed by June 1, 1922, the time provided in the contract. There was some talk between the parties relative to the completion of the work after June 1, but no definite arrangements

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Partlow, P.J.

Appellee, Ralph K. Jewett, began an action of trespass on the case on promises in the circuit court of Winnebago county against appellant, Harlan Shepardson. There was a trial by jury and a verdict in favor of appellee for $817. The court required a remittitur of $617, judgment was rendered for the balance, and this appeal followed.

On November 3, 1921, a written contract was entered into between appellant and appellee which provided that appellee, for $1800, was to clear forty acres of timber land for appellant ready for the plow not later than June 1, 1922. Appellee was to have all the wood on the land, and was to be paid $500 within ten days after he had commenced work with a good force of men, $300 in about three weeks after the first payment, and the balance of $800 when the work was completed. It appears that on the date the contract was entered into a portion of this forty acres, variously estimated at between ten and twenty acres, had already been cleared. Shortly after the contract was executed, appellee with a force of colored men started to work and continued for over seven months, and the $500 and $300 payments were made when due. As the work progressed appellee sold appellant two mules for $225, and some hogs for $398. There were some credits on these amounts, but appellant admitted $398.50 was unpaid. Appellee claims he cut 31884 feet of logs, worth $20 per thousand, amounting to $798, and 280 cords of wood worth $6 per cord, amounting to $1680. The work was not completed by June 1, 1922, the time provided in the contract. There was some talk between the parties relative to the completion of the work after June 1, but no definite arrangements

were made until about June 20, when appellee took some steps towards selling the logs and cord wood. Appellant claims he told appellee at that time that he did not want him to take the logs off until the job was finished. Appellee's men started back to work after this talk and appellant told them he did not want them to do any more work until there was a definite understanding. Immediately thereafter appellant took a chain and locked the gate so appellee and his men could not get to the land, whereupon appellee began this suit.

Appellee claims he cut the wood above specified, sold to appellant the mules and hogs, that he was entitled to the balance of $800 on the contract, that he furnished machinery to appellant of the value of $87.50, material for a fence of the value of $63.50, performed additional labor to the value of $200, that on June 23, without any right, the appellant refused to permit him to continue the work, caused the gate to be locked preventing the completion of the work, that appellant took possession of the logs, cord wood, timber and machinery belonging to the appellee and disposed of the same, that appellee was ready, able and willing to complete the contract and was prevented from so doing by appellant; that when he commenced work he began next to the river by direction of appellant; that the river overflowed and he was prevented from working for a considerable length of time; that after June 1, appellant waived the time within which the contract was to be performed and permitted appellee to proceed, that it was only after he had attempted to sell some of the logs that appellant locked the gates, denied him admission to the land, and thus prevented him from completing the contract, that it would cost about $650 to complete the work, that for these reasons he is entitled to recover.

Appellant contends that soon after the ~~xxxxxxx~~ contract was entered into, appellee put about eighteen colored men to work. They were shiftless and did not understand the job. They did not work steadily and the force was greatly reduced at times. On June 1 appellee did not have the work completed, but he had finished all of the work which was profitable to him. He had the timber cut and the logs and

were made until about June 20, when appellee took some steps towards selling the logs and cord wood. Appellant claims he told appellee at that time that he did not want him to take the logs off until the job was finished. Appellee's men started back to work after this talk and appellant told them he did not want them to do any more work until there was a definite understanding. Immediately thereafter appellant took a chain and locked the gate so appellee and his men could not get to the land, whereupon appellee began this suit.

Appellee claims he cut the wood above specified, sold to appellant the mules and logs, that he was entitled to the balance of $800 on the contract, that he furnished machinery to appellant of the value of $87.50, material for a fence of the value of $83.50, performed additional labor to the value of $800, that on June 23, without any right, the appellant refused to permit him to continue the work, caused the gate to be locked preventing the completion of the work, that appellant took possession of the logs, cord wood, timber and machinery belonging to the appellee and disposed of the same, that appellee was ready, able and willing to complete the contract and was prevented from so doing by appellant; that when he commenced work he began next to the river by direction of appellant; that the river overflowed and he was prevented from working for a considerable length of time; that after June 1, appellant waived the time within which the contract was to be performed and permitted appellee to proceed, that it was only after he had attempted to sell some of the logs that appellant locked the gates, denied him admission to the land, and thus prevented him from completing the contract, that it would cost about $350 to complete the work, that for these reasons he is entitled to recover.

Appellant contends that soon after the ~~xxxxxxx~~ contract was entered into, appellee put about eighteen colored men to work. They were shiftless and did not understand the job. They did not work steadily and the force was greatly reduced at times. On June 1 appellee did not have the work completed, but he had finished all of the work which was profitable to him. He had the timber cut and the logs and

wood so he could readily turn them into money. At that time about twenty acres of the land were not cleared, part of the stumps had been taken out and some of the land had been partially and poorly grubbed but only about an acre and a half was ready for the plow. Some of the stumps had been broken off at the top of the ground and the roots had not been cut off or the holes filled up. In the acre and a half that was supposed to be ready for the plow, appellant claims he had taken the plow out of the ground twenty or twenty-five times on account of the stumps. When appellee quit there were about 1640 stumps still standing, not including those four inches and under. It is admitted by the appellant that, in places, appellee had done a pretty fair job, but that the most of it was a poor job and he claims it would cost him $2000 to complete the job as specified in the contract. Appellant contends that appellee made default on the contract and cannot recover.

The first question is whether appellee was guilty of a breach of the contract in not completing it within the time and in the manner specified, and whether this breach was waived by the appellant. We have read the evidence with considerable care. It is apparent that the work was not completed in all respects as provided in the contract and was not completed within the time specified. If the evidence on behalf of the appellee is to be believed, the appellant waived any breach of the contract, and he was responsible for the failure of appellee to complete the contract after June 1, 1922. On the other hand, if the evidence on behalf of the appellant is to be believed, appellee was guilty of a breach of the contract, which breach was not waived and he cannot recover. The most that can be said on this point is that the evidence is in conflict. It is not sufficient grounds for a reversal that the evidence is in conflict, but before we would be justified in reversing the judgment, we must believe that the judgment is contrary to the evidence. We cannot say this is true.

In his brief and argument, appellant has stated the account between the parties. He has charged himself with the balance due

wood so he could readily turn them into money. At that time about twenty acres of the land were not cleared, part of the stumps had been taken out and some of the land had been partially and poorly grubbed but only about an acre and a half was ready for the plow. Some of the stumps had been broken off at the top of the ground and the roots had not been cut off or the holes filled up. In the acre and a half that was supposed to be ready for the plow, appellant claims he had taken the plow out of the ground twenty or twenty-five times on account of the stumps. When appellee quit there were about 1640 stumps still standing, not including those four inches and under. It is admitted by the appellant that, in places, appellee had done a pretty fair job, but that the most of it was a poor job and he claims it would cost him $3000 to complete the job as specified in the contract. Appellant contends that appellee made default on the contract and cannot recover.

The first question is whether appellee was guilty of a breach of the contract in not completing it within the time and in the manner specified, and whether this breach was waived by the appellant. We have read the evidence with considerable care. It is apparent that the work was not completed in all respects as provided in the contract and was not completed within the time specified. If the evidence on behalf of the appellee is to be believed, the appellant waived any breach of the contract, and he was responsible for the failure of appellee to complete the contract after June 1, 1922. On the other hand, if the evidence on behalf of the appellant is to be believed, appellee was guilty of a breach of the contract, which breach was not waived and he cannot recover. The most that can be said on this point is that the evidence is in conflict. It is not sufficient grounds for a reversal that the evidence is in conflict, but before we would be justified in reversing the judgment, we must believe that the judgment is contrary to the evidence. We cannot say this is true.

In his brief and argument, appellant has stated the account between the parties. He has charged himself with the balance due

on the contract, the amount due for the hogs, mules, posts, logs and cord wood, amounting in all to $3607.10. He has credited himself with $827.87, which he claims he expended for clearing eight acres of the land remaining uncleared by appellee, leaving twelve acres which are not in condition for the plow. He credited himself with the difference between 260 cords of wood, as claimed by the appellee, and 88 cords which he claims were actually on the land, making $1032, together with a difference of one dollar per cord, or $88. He also credits himself with rent for the twenty acres of $8 per acre, $160, with $36 for a cable and $20 for a tent, making a total credit of $3162.87, leaving a balance due appellee of $444.23.

From our examination of the evidence we are of the opinion that in this statement of account, appellant has credited himself with more than he is entitled to and that some of the items are not sustained by the evidence. We do not think the credits of $1032 and $88 are sustained by the evidence, and if these amounts are deducted, it leaves a little over $1500 due to appellee according to appellant's own statement. In addition to this, there is such a variance in the evidence as to the character of the work done on the land supposed to have been cleared and also as to the amount which it will take to clear the balance of the land, that we feel the judgment of $1500 is not contrary to the evidence and we would not be justified in disturbing it on that account.

Complaint is made of the third instruction given on behalf of the appellee on the ground that it left the jury to determine what facts constituted a waiver of the contract. We have examined the instruction and do not think it is capable of the interpretation placed upon it by appellant. Complaint is made of the refusal of the trial court to give the third, fourth, fifth and seventh instructions offered on behalf of appellant. These instructions called specific attention to certain features of the evidence and undertook to tell the jury what should be done in case they find certain facts. We think the instructions, as given by the court, fully covered all the questions of law in the case necessary to be considered by the

on the contract, the amount due for the logs, mules, posts, logs and cord wood, amounting in all to $3807.10. He has credited himself with $887.87, which he claims he expended for clearing eight acres of the land remaining uncleared by appellee, leaving twelve acres which are not in condition for the plow. He credited himself with the difference between 280 cords of wood, as claimed by the appellee, and 80 cords which he claims were actually on the land, making $1038, together with a difference of one dollar per cord, or $88. He also credits himself with rent for the twenty acres of $8 per acre, $160, with $36 for a cable and $20 for a tent, making a total credit of $3183.87, leaving a balance due appellee of $444.23.

From our examination of the evidence we are of the opinion that in this statement of account, appellant has credited himself with more than he is entitled to and that some of the items are not sustained by the evidence. We do not think the credits of $1038 and $88 are sustained by the evidence, and if these amounts are deducted, it leaves a little over $1500 due to appellee according to appellant's own statement. In addition to this, there is such a variance in the evidence as to the character of the work done on the land supposed to have been cleared and also as to the amount which it will take to clear the balance of the land, that we feel the judgment of $1500 is not contrary to the evidence and we would not be justified in disturbing it on that account.

Complaint is made of the third instruction given on behalf of the appellee on the ground that it left the jury to determine what facts constituted a waiver of the contract. We have examined the instruction and do not think it is capable of the interpretation placed upon it by appellant. Complaint is made of the refusal of the trial court to give the third, fourth, fifth and seventh instructions offered on behalf of appellant. These instructions called specific attention to certain features of the evidence and undertook to tell the jury what should be done in case they find certain facts. We think the instructions, as given by the court, fully covered all the questions of law in the case necessary to be considered by the

jury and there was no error in the refusal of these instructions. Error is assigned on an instruction given by the court of its own motion, relative to the measure of damages in case the facts should be found as claimed by the appellee. If there was a waiver of the provisions of the contract by appellant and the appellee had a right to proceed with the contract and was prevented from so doing by the appellant, the instruction as given was correct and fixed a correct measure of damages.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

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Error is assigned on an instruction given by the court of its own motion, relative to the measure of damages in case the facts should be found as claimed by the appellee. If there was a waiver of the provisions of the contract by appellant and the appellee had a right to proceed with the contract and was prevented from so doing by the appellant, the instruction as given was correct and fixed a correct measure of damages.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of April in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

James E. Bennett, Frank A. Miller,
Frank J. Saibert and Frank F. Thompson,
co-partners doing business as James
E. Bennett & Company,
appellants,

vs.

Samuel Jacobson,
appellee,

Appeal from the Circuit
Court of La Salle
County.

Partlow, P.J.

The appellants, James E. Bennett, Frank A. Miller, Frank J. Saibert and Frank F. Thompson, co-partners doing business as James E. Bennett & Company, began an attachment suit in the circuit court of La Salle county against appellee, Samuel Jacobson, to recover $1814.52 alleged to be due. The Union National Bank of Streator, Illinois, was served as garnishee and certain real estate belonging to appellee was attached. Upon issue being joined there was a trial by jury, judgment for appellee, and this appeal was prosecuted.

The evidence shows that appellee had been engaged in the wholesale tobacco and candy business in Streator, Illinois, for about eighteen years. Since 1880, appellants had been dealers in bonds and stocks, grain and cotton, with general offices in Chicago, and a part of the time they had a branch office in Streator. They were members of the Chicago, New York and St. Louis stock exchanges. Appellee testified that on March 31, 1919, he went to the Streator office of appellants and talked with their manager in regard to buying stock. He told the manager he would like to buy stock on two or three point margin but that he did not want the certificates. He testified the manager told him he could get anything he wanted but he would have to put a stop order with each purchase. From that date until November 11, 1919, he had a total of sixty-nine transactions, in each of which he put up $2 for each share of stock

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purchased and always agve a stop order with each purchase. He received only two certificates during that time and sixty-seven transactions were carried on margins. When the price increased appellants paid him the margin, if the price decreased he paid appellants the difference, and in these transactions he lost about $10,000. He paid the most of this loss, but at the end of his dealings appellants claimed he was indebted to them in the sum of $1814.52, for which this suit was commenced. He also claims that no statement of this alleged indebtedness was sent to him until more than a year after his account was closed.

The manager of appellants testified that he had several conversations with appellee in which he told appellee that all the stocks were bought for delivery, and that he could get the certificates if he wanted them; that there were several instances in which appellee requested the delivery of the certificates and delivery was made to him in each of these cases. The evidence of appellants tends to show that each and every one of the transactions with appellee were executed. In executing these transactions the orders were sent to Chicago from Streator and then to New York where they were executed on the New York Stock Exchange. The actual certificates were delivered to the appellants' New York representative who held them subject to the appellants' order. The appellants were charged with the full value of the stock and the certificates were held as collateral for the balance of the purchase price. Most of the stock was listed on the New York Stock Exchange. The appellee could have received his stock if he desired it, The only financial interest which the appellants had was their commission. On stock selling under $10 per share the commission was $7.50 per hundred, and on stock selling for over $10 per share and up to $125 per share the commission was $15 per hundred, which commissions were fixed by the New York and Chicago Stock Exchanges, that the greatest amount which the appellee owed at any one time was $3300. After the appellee's account was closed in November, 1911, he paid $500 on three different occasions, and on March 12, 1920, wrote appellants to cancel his stop order on certain stock which he intended to

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take. Evidence was also offered by the appellants tending to prove that after the termination of the purchases, appellee started an account in his wife's name, which account ran for over a year, during which time he bought and paid for stock which was taken in his wife's name and that each and every one of these transactions was fulfilled and the certificates delivered to the wife.

On the attachment issue the evidence shows that during the latter part of July or the first part of August, 1922, appellee sold his business in the city of Streator, and there was evidence tending to show that appellee told certain parties he was going to leave town, that he was going to clean up and go to California; and certain newspaper articles were published relative to the appellee's selling his business and going away. Appellee denied that he intended to go away, and testified that what he did say was that if he got a little money ahead he would make a little trip to California. He denied he said he was going to move to California.

This is practically all of the evidence on the issue of the attachment and whether or not these various transactions were in fact gambling transactions. We are asked to review this evidence and hold that it was sufficient to justify a verdict in favor of the appellants on both of these issues. For the reason that the judgment will have to be reversed on account of erroneous instructions, we refrain from passing upon the weight of the evidence, and leave that question for the consideration of another jury.

There was a sharp conflict in the evidence and it was of the utmost importance that the jury, in order to properly and correctly determine these questions of fact, should be accurately instructed as to the law applicable to the facts. The tenth instruction on behalf of the appellee told the jury that the burden of proving that defendant owed plaintiffs anything on account was upon the plaintiffs, and unless plaintiffs had proven by the preponderance of all the evidence that defendant was indebted to them, then the plaintiffs could not recover. To the declaration appellee filed the general issue

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together with notice that he would prove that the various transactions in question were gambling transactions. Under this state of the pleadings the burden was upon the appellants to prove the various transactions with appellee together with the amounts unpaid. There was very little, if any, dispute as to these items and the amounts which they represented. Upon this proof being made, if no other evidence had been offered, appellants would have been entitled to judgment. Proof that the transactions were gambling transactions was an affirmative defense, and the burden was upon appellee to prove this defense by a preponderance of the evidence. Lelouze v. Slaughter, 241 Ill. 215; Pixley v. Boynton, 79 Ill. 351; Johnson v. Milmine, 150 Ill. App. 208; Kerting v. Sturtevant, 181 Ill. App. 517. Notwithstanding the fact that the burden was upon the appellee to prove that these were gambling transactions, the tenth instruction told the jury that the burden of proving that the defendant owed the plaintiffs anything on account was upon the plaintiffs. This instruction made no mention of these transactions being gambling transactions and from it the jury might have thought that the burden of proof was on appellants to prove that the transactions were not gambling transactions. In Cutler v. Partridge, 182 Ill. App. 350, an instruction quite similar to this one was held to be erroneous. Appellee contends, however, that any error in this instruction was cured by the fifth instruction given on behalf of the appellants, which told the jury that the burden of proving the defense of gambling was upon the appellee. We do not think this is true. The tenth instruction directed a verdict. If an instruction directs a verdict it must contain all the facts which would authorize the verdict directed. Partridge v. Cutler, 168 Ill. 504; Illinois Iron and Metal Co. v. Weber, 196 Ill. 526. Such an instruction must be technically accurate and it can receive no aid from any other instruction. Such errors and omissions are not cured by the giving of other instructions. The jury might determine that the instructions were in conflict, but they would not know which one to follow. Swiercz v. Illinois Steel Co. 231 Ill. 457; Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243; Illinois Central

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Railroad Co. v. Smith, 208 Ill. 608.

The eleventh instruction on behalf of appellee told the jury that the burden of proving that the defendant was about to depart from this state and have his goods removed was upon the plaintiffs, and if the plaintiffs failed to prove their case by a preponderance of the evidence on that point, their verdict on that issue should be for the defendant. The attachment statute provides nine classes of cases in which a creditor may have an attachment against the property of his debtor. The declaration in this case was based upon the fourth and fifth provisions of the statute. The fourth provides that where the debtor is about to depart from the state, and the fifth provides that where the debtor is about to remove his property from the state to the injury of the creditor, that an attachment will lie. The eleventh instruction did not tell the jury that the burden of proof was upon the appellants to prove either one of these grounds of attachment, but the instruction told the jury that the burden of proof was upon the appellants to prove both of these grounds. It is claimed this instruction is in accordance with the declaration, but the law is well settled that if the plaintiff proves any one of the grounds of attachment he is entitled to a writ of attachment. The instruction as given was erroneous.

The twelfth instruction on behalf of appellee told the jury that if they believed from the evidence that the attachment was sued out without sufficient cause, then the jury should find the issues for the defendant on the attachment issue. What constituted sufficient cause is expressly provided by statute. Under this instruction the jury might have found that appellee was about to depart from the state with the intention of having his effects removed from the state, or that he was about to remove his property from the state to the injury of the plaintiff, and the jury might have determined that neither one, or both, of these facts constituted a sufficient cause for suing out the attachment, whereas the statute expressly provides that either one of them is sufficient. This instruction was also erroneous.

Railroad Co. v. Smith, 208 Ill. 608.

The eleventh instruction on behalf of appellee told the jury that the burden of proving that the defendant was about to depart from this state and have his goods removed was upon the plaintiffs, and if the plaintiffs failed to prove their case by a preponderance of the evidence on that point, their verdict on that issue should be for the defendant. The attachment statute provides nine classes of cases in which a creditor may have an attachment against the property of his debtor. The declaration in this case was based upon the fourth and fifth provisions of the statute. The fourth provides that where the debtor is about to depart from the state, and the fifth provides that where the debtor is about to remove his property from the state to the injury of the creditor, that an attachment will lie. The eleventh instruction did not tell the jury that the burden of proof was upon the appellants to prove either one of these grounds of attachment, but the instruction told the jury that the burden of proof was upon the appellants to prove both of these grounds. It is claimed this instruction is in accordance with the declaration, but the law is well settled that if the plaintiff proves any one of the grounds of attachment he is entitled to a writ of attachment. The instruction as given was erroneous.

The twelfth instruction on behalf of appellee told the jury that if they believed from the evidence that the attachment was sued out without sufficient cause, then the jury should find the issues for the defendant on the attachment issue. What constituted sufficient cause is expressly provided by statute. Under this instruction the jury might have found that appellee was about to depart from the state with the intention of having his effects removed from the state, or that he was about to remove his property from the state to the injury of the plaintiff, and the jury might have determined that neither one, or both, of these facts constituted a sufficient cause for suing out the attachment, whereas the statute expressly provides that either one of them is sufficient. This instruction was also erroneous.

The following question was asked appellee on direct examination: "How much do you owe James F. Bennett & Company, if you know?" Over objection he was permitted to answer "I don't owe them anything; in fact I overpaid them." There was no question in the case of payment or overpayment. This question called for the conclusion of the witness and it was erroneous to permit it to be answered.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

The following question was asked appellee on direct examination:

How much do you owe James E. Bennett & Company, if you know?" Over objection he was permitted to answer "I don't owe them anything; in fact I overpaid them." There was no question in the case of payment or overpayment. This question called for the conclusion of the witness and it was erroneous to permit it to be answered.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of Mar. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 633

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7210
~~7102~~

Agenda 8.

Annetta Kolb,
Appellee,

vs

Peoria Railway Co.,
Appellant.

Appeal from the
Circuit Court
of Peoria County.

Jett, J.

Annetta Kolb, appellee, instituted this suit in the Circuit Court of Peoria County against Peoria Railway Company, appellant. A trial was had and the jury returned a verdict assessing the damages of appellee at $15,000. Judgment was rendered on the verdict and this appeal followed.

The declaration consisted of four counts, with the ad dammum laid at $25,000.00. It is charged in the first count that appellee was a passenger for reward on a car of appellant a common carrier and that by the general negligence of the servants of appellant she was thrown to the street and injured. The second charges that appellee went on the car "for the purpose of becoming a passenger thereon"; that the conductor told appellee the car went to some other destination than appellee desired; that appellee attempted to alight while the car was standing and that appellant, by starting the car while appellee was alighting, threw appellee to the street and injured her. In the third it is alleged that appellant's car had a folding door and step, which door was closed and step folded when the car was in motion, which practice was unknown to appellee; that appellee boarded the step of said car but, discovering it did not go to the destination she desired, attempted to alight while the car was still standing, and was thrown and injured by the sudden starting of the car without warning and without closing the door. The fourth count is the same as the third except it charges appellee intended to enter the car to become a passenger thereon. Appellant filed the plea of the general issue and a trial was had and resulted as above stated.

Appellant operates a certain railway line which commences near the center of the City of Peoria and passes the residence of appellee in said city. The injury complained of occurred a half block

Agenda 8.

Annette Kolb,
Appellee,

vs

Peoria Railway Co.,
Appellant.

Appeal from the
Circuit Court
of Peoria County.

Ret, J.

2321 A. 633

Annette Kolb, appellee, instituted this suit in the Circuit Court of Peoria County against Peoria Railway Company, appellant. A trial was had and the jury returned a verdict assessing the damages of appellee at $15,000. Judgment was rendered on the verdict and this appeal followed.

The declaration consisted of four counts, with the ad damnum laid at $25,000.00. It is charged in the first count that appellee was a passenger for reward on a car of appellant a common carrier and that by the general negligence of the servants of appellant she was thrown to the street and injured. The second charges that appellee went on the car "for the purpose of becoming a passenger thereon"; that the conductor told appellee the car went to some other destination than appellee desired; that appellee attempted to alight while the car was standing and that appellant, by starting the car while appellee was alighting, threw appellee to the street and injured her. In the third it is alleged that appellant's car had a folding door and step, which door was closed and step folded when the car was in motion, which practice was unknown to appellee; that appellee boarded the step of said car but, discovering it did not go to the destination she desired, attempted to alight while the car was still standing, and was thrown and injured by the sudden starting of the car without her being and without closing the door. The fourth count is the same as the third except it charges appellee intended to enter the car to become a passenger thereon. Appellant filed the plea of the general issue and a trial was had and resulted as above stated.

Appellant operates a certain railway line which commences near the center of the City of Peoria and passes the residence of appellee in said city. The injury complained of occurred a half block

from appellee's residence. About two miles further out the car line divides with one branch which goes to the Country Club and the other to what is known as the Tavern at Peoria Heights. No one car goes to both destinations, some cars travel the Country Club branch while others go over the Tavern branch. All cars on this line carry a large "H" sign on the roof designating the line as the "Heights" line. They also carry another sign in the window of the front vestibule which reads " Country Club" or "Heights", according to the branch the car finally travels.

The car in question travelled the Country /Club branch and carried the "Country Club" sign. Appellee wished to travel the other branch to the "Heights" or "Tavern". She stopped the Country Club car at the regular stop and the conductor opened the rear half of the platform doors letting down the step. It is the contention of appellee that she could not see the conductor and that she got on to the step and inquired where the car went and upon discovering from him that the car went to the Country Club appellee started to alight and that while she had one foot on the ground and the other on the step the car started throwing her to the pavement.

It is contended by appellant that appellee before she boarded the car asked the conductor if it was a Country Club car and he informed her it was; that appellee then got on the platform and asked the same question and received the same answer; that the conductor then gave the motorman the signal to start; that appellee then started to get off, and the conductor told her to wait but she did not; that the conductor gave the signal to stop but before the car stopped and while it was in motion appellee attempted to alight and fell and in so doing received injuries complained of.

The testimony is conflicting as to just how the injury was occasioned. Appellee's injuries consisted of a broken right hip, a broken bone in the right arm near the wrist and contusions about the head and other parts of the body.

from appellee's residence. About two miles further out the car line divides with one branch which goes to the Country Club and the other to what is known as the Tavern at Peoria Heights. Some cars goes to both destinations, some cars travel the Country Club branch while others go over the Tavern branch. All cars on this line carry a large "H" sign on the roof designating the line as the "Heights" line. They also carry a sign in the window of the front vestibule which reads "Country Club" or "Heights", according to the branch the car finally travels.

The car in question travelled the Country Club branch and carried the "Country Club" sign. Appellee wished to travel the other branch to the "Heights" or "Tavern". She stopped the Country Club car at the regular stop and the conductor opened the rear half of the platform doors letting down the step. It is the contention of appellee that she could not see the conductor and that she got on to the step and inquired where the car went and upon discovering from him that the car went to the Country Club appellee started to alight and that while she had one foot on the ground and the other on the step the car started throwing her to the pavement.

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The testimony is conflicting as to just how the injury was occasioned. Appellee's injuries consisted of a broken right hip, a broken bone in the right arm near the wrist and contusions about the head and other parts of the body.

It is first urged by appellant that the verdict is contrary to the evidence, and that it rests entirely upon the unsupported testimony of appellee. We do not agree with this contention. We do not think the verdict of the jury is based entirely upon the uncorroborated testimony of appellee. Corroborating facts and circumstances are found in the testimony of the witness Thurman, the street sweeper, who testified when his attention was called to the presence of the car appellee had one foot on the step and the other on the walk, and as he looked, the car started and she fell on her side.

It is insisted by appellant that the verdict is excessive. It is shown by the evidence that appellee was seriously injured. She was confined to her bed for many months, and in all probability will be unable to walk without crutches. Her arm was badly injured so that she cannot use it as a seamstress as she did before she received the injury. In view of what is disclosed by this record relative to the character of the injuries appellee received, and the effect of the same upon her, we are not prepared to say that the verdict is excessive.

The question is discussed as to whether or not appellee was a passenger. It is immaterial whether or not she was a passenger for the reason it is charged in some of the counts of the declaration that she was a passenger and in others that she was about to become a passenger. Complaint is made by appellant of certain evidence admitted by the court which was used as the foundation for a so called impeachment of the conductor on the car in question. To our minds this evidence went clear beyond the proper scope of impeachment and the conductor was compelled on cross examination to to answer certain questions, which should not have been permitted and as these questions were made the basis for an argument to the jury the arguments made based upon the answers to the questions by counsel for appellee, were such as to create a prejudice in the minds of the jury.

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witness Stoughton who was on the car at the time the injury was occasioned, and who formerly lived in Peoria, but who worked in Pittsburg at the time of the trial and came from the City of Pittsburg to testify in the case. We have examined the record particularly with reference to the cross examination of the witness and while it was objectionable and should have been controlled by the court, it is the argument of counsel for appellee based on the cross examination that was the most harmful.

The following is characteristic of the argument made by counsel for appellee in this cause. Mr. Shurtleff of counsel said: "My friend, Mr. Page, made a statement on his side of what his defense was, but he didn't go very much in detail as to what he expected to prove. There was no reference by him to Mr. Stoughton of Pittsburg, and we were left in the dark as to what his defense would be. Mr. Clark, the conductor in this case, was careless. He Practically admitted it when he said on the witness stand he had his mind on something else. Before he talked to any official of the street car company and when he was feeling badly, he told Mr. Knilans just how he felt about it. He said, "I pulled that rope thoughtlessly. I don't know how it happened, and I made a mistake in pulling the rope before the door was shut." That was the staement he made, and it did happen that way. I believe in the bottom of his heart Mr. Clark is as sorry for this lady as any one in the court room. I think he did just what he told Bob Knilans he did, and injured her. His testimony was put in to help the street car company. The same street car company who can reach over into Pittsburg and bring a man here like Stoughton.

Objection by Defendant to statement of Counsel

Objection overruled.

I don't wonder my friend don't like to hear me say anything about Stoughton. I think he would be ashamed of Stoughton. We used to try cases for stolen goods; bring a man in the court room

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I don't wonder my friend don't like to hear me say anything about Stoughton. I think he would be ashamed of Stoughton. We used to try cases for stolen goods; bring a man in the court room

and put him on trial and find he had John Smith's watch.

Argument of Counsel objected to by Defendant.

The Court: The Court cannot tell to what he refers.

Objection overruled.

What I was going to say was that-----

Statement of Counsel objected to by Defendant.

We would get the man and he would say, "I met a mysterious stranger, who gave me----"

Statement of Counsel objected to by Defendant.

The Court: Objection overruled. The jury judge from the evidence. The remarks of Counsel are for the purpose of explaining the testimony, but any remarks that are purely illustrative are not considered by the jury as evidence.

With our friend Stoughton from Pittsburg, a man he never knew handed him something. It reminded me of the same mysterious stranger who gave John Smith----

Objection by Defendant to argument of Counsel.

I regret to refer to any unpleasant references in the trial. Now Stoughton from Pittsburg said he was handed something----

Argument of Counsel objected to by Defendant, as not being the testimony of the witness.

The Court: The Court doesn't assume that words, "Handed something", were used in any improper sense.

I must say a little more about Stoughton of Pittsburg. It is unpleasant to me as anybody else. Now he said that somebody handed him $27.00 and he didn't know who it was. Had absolutely no idea who it was handed him $27.00 in his room in Pittsbury, and it seemed such a remarkable thing that a man would come along and make him a present, we pursued the thing a little further and it was developed it was handed to him by a man from the Pittsbury Railway Company, a man whose name he dien't know. He came to Peoria last Monday and it cost him $21.21, and he has been staying here at the expense of the Peoria Railway Company, and he hopes he will get money enough to get back to Pittsburg.

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oney enough to get back to Pittsburg.

Now Mr. Stoughton was apparently sent here by some agent of the street car company of Pittsburg.

Objection to argument, by Defendant; not based on any evidence in the Record.

Objection overruled.

And he testified that Mrs. Kolb was up in the car on that day, at the point where she said she wasn't, and where Mr. Thurman said she wasn't and from the statement made by Mr. Clark to Mr. Knilans would indicate she wasn't. So all they have left in the defense of this case is Mr. Stoughton, of Pittsburg. Mr. Page made no reference to him, and I wonder how much weight that man's testimony is entitled to in this court. He comes from Pittsburg, mysteriously appears in the court room, gives testimony that is not true, comes here with money handed him by the street car company of Pittsburg, and I don't believe a jury in Peoria County, Illinois, will decide a case on the testimony of this kind.

You have a right to give her such a sum of money, as, in your judgment, will in some measure compensate her for the anguish and grief, and loss of pleasure she will forego in the remaining years of her life. I want you to compute liberally. No matter how much she gets, it will not compensate her for the loss of her health, but if her good husband is taken away from her, she won't have to be an object of charity, either from relatives and friends or Peoria County.

Objection to argument by defendant.

Objection overruled.

In the argument it was said nobody accounts for Stoughton but Stoughton himself. He injects himself in this case, a paid witness of the defendant in the case. Objection was made to this argument and sustained and the remark withdrawn.

The assault made upon the witness Stoughton, together with the so-called impeachment of Clark, conductor, and the argument based upon the alleged impeachment, and relative to the element of

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The assault made upon the witness Stoughton, together
with the so-called impeachment of Clark, conductor, and the argument
based upon the alleged impeachment, and relative to the element of

damages, was, in our opinion, so prejudicial that it is reversable error. We are not unmindful of the fact that much latitude is permitted in the cross examination of witnesses, and the argument of cases to juries, yet, when the examination and argument is such that it has the effect of prejudicing the jury, a verdict obtained by such means, cannot stand.

Litigants are entitled to have their cases presented in such a way that the evidence will be considered by juries, free and clear, of any prejudice created in their minds by reason of any unwarranted assault, made upon the witnesses in the case.

In view of the record in this proceeding, we are of the opinion the jury was not in that frame of mind that they could fairly and impartially consider the evidence, presented for their consideration.

The judgment is therefore reversed and the cause is remanded for another trial.

Reversed and Remanded.

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The judgment is the efore reversed and the cause is remanded for another trial.

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STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of Mar. in the year of our Lord one thousand nine hundred and twenty four.

Justus L. Johnson

Clerk of the Appellate Court.

3628a-29a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 633

BE IT REMEMBERED, that afterwards, to-wit: On FEB 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Laura Aufdenspring,
appellee,
vs.
Herman R. Aufdenspring,
appellant,

Appeal from the Circuit Court
of Winnebago County.

Jett, J.

On March 29, 1923, appellee filed her bill for separate maintenance. Appellant answered and filed his cross-bill charging appellee with extreme and repeated cruelty and prayed for a divorce. Answer to cross-bill and replications were filed and the cause was heard by the chancellor and a decree rendered dismissing the cross-bill for want of equity, finding that appelee was living separate and apart from appellant without her fault, awarding to her the custody of their minor child, Robert Jerome Aufdenspring, ten years of age and allowing her for her separate maintenance the sum of $145.00 per month, the same tobe paid in installmentsof $72,50 on the second and seventeenth day of each month. From this decree appellant brings the record to this court for review. It is not argued that the chancellor erred in dismissing the cross-bill but it is insisted that the decree is erroneous for the following reasons, viz: (I) That there is no provision in the decree for appellant to visit his child or have him in his custody at any time: (2) That the evidence is insufficient to warrant the court in finding that appellee was living separate and apart from appellant without fault on her part; and (3) That the allowance of $145.00 per month is excessive.

The answer of appellant stated that he was living at a hotel in the city of Rockford; that his business compelled him to be away from home all day and many times until late in the evening and it would be better for his child to remain with his

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The answer of appellant states that he was living at a hotel in the city of Rockford; that his business compelled him to be away from home all day and many times until late in the evening and it would be better for his child to remain with his

mother. Appellant can not therefore complain of that portion of the decree which awards the custody of the minor son to appelee inasmuch as appellant is granted the privilege of enjoying his society and company on Sunday afternoons. It is therefore not necessary to further consider the first assignment of error.

The evidence shows that the parties hereto were married in July 1908 and lived together until March 26, 1923. The trouble between them started long prior to their separation and probably had its inception at the time appellee found a letter directed to appellant from another woman. The day preceeding their separation appellee phoned appellant with reference to renting the lower flat of the building in which they lived. The parties do not agree as to the details of the conversation but according to appellee, upon appellant's arrival at home for dinner she inquired of him what he meant by talking to her the way he did over the phone and he replied, "I have decided to have my freedom and peace of mind and I am going to get a divorce and I have put it in the hands of my attorney." This conversation is not denied by appellant but he insists that when he came home appellee was angry, called him a liar and a sneak and struck him in the face and scratched him six or seven times. The parties had dinner together but shortly thereafter appellant left, returning home late that evening and retired without seeing his wife. The following day they had breakfast and dinner together but little, if any thing, was said and appellant returned home during the afternoon while appellee was absent, secured his clothing and the parties have not, since that time, lived together. There is considerable conflicting evidence and it is apparent that there had been quarreling between the parties for some time. Appellee perhaps is not wholly blameless. There were sallies of passion on her part and the use of language which can not be approved. She is probably a woman of nervous temperment and jealous disposition and her treatment of appellant has not always been marked by kindness and wifely affection but there is nothing in the evidence which justifies the conduct of appellant in leaving

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his home and his child.

We are convinced that appellant had made up his mind to secure his freedom. He admitted that on two or three different occasions he had told his wife he wanted a divorce and after the bill in this case had been filed and just prior to the hearing he sent word to his wife that if she would ~~apply~~ apply for a divorce he would not appear against her. The chancellor heard and saw the witnesses and he was far more able than we are to perceive the motives and conduct of the parties and while the evidence is conflicting it sustains the finding and decree of the court that appellee is living separate and apart from appellant without her fault.

It is next insisted that the award of $145.00 per month to appellee for the support and maintenance of herself and minor child is excessive. It is not quite clear from the record whether appellant receives $290.00 per month and in addition an expense account of $15.00 per month, or whether his salary exclusive of his expense account, is $275.00 per month. At the time appellant left he only took from their home his clothing leaving with appellee all the furniture and belongings of this home, together with $850.00 which had been invested in bonds and War Savings Stamps. This sum represented all of their savings except a contract for the purchase of a lot in Florida upon which $300.00 had been paid in December 1921. This was an installment, contract, made to both parties and provided for the payment of $15.00 per month. Under the decree it was ordered that appellee should retain the custody of the securities and directed that one-half the income derived therefrom should be retained by appellee and the remaining one-half turned over to appellant; that the agreement for the Florida land should be delivered to appellant, but the interest of the parties should remain the same as shown by the agreement and in the event of a sale of said premises the proceeds should be divided equally, first allowing to appellant all payments made by him under the terms and provisions of said agreement after the entry of the decree herein.

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The amount of alimony to be allowed in a separate maintenance

suit is to determined in the same manner as in a case for divorce. Harding vs Harding 180 Ill. 481. Decker vs Decker ~~#~~ 279 Ill. 300. There is no inflexible rule by which the amount of separate mainetenance can be fixed but it must be determined from the facts and circumstances of each case. "The amount allowed a wife for separate maintenance or alimony varies from a sum sufficient to meet the actual wants and necessities of the wife, to a third and even a half of the income of the husband." Decker vs Decker, supra. "The amount of alimony to be allowed a wife depends not only upon the question of the misconduct of the husband but also upon the matter of their property and income, their ages, health, past and present habits, social, conditions and circumstances and upon the further question whether or not there are children dependent upon one or both of them for support, and the amount required therefor by each party. The amount allowed a wife for alimony varies from a sum sufficient to meet the actual wants and necessities of the wife, to a third or more of the husband's income," Gilbert vs Gilbert 305 Ill. 216.

In Williford vs Williford 162 Ill. App. 24, the evidence showed that the husband was receiving a salary of $2500.00 and was the owner of $2000.00 worth of personal property and it was held that an allowance to the wife of the use of the homestead which the husband owned and an award of $60.00 permonth for the support of herself and two minor children was not excessive.

In Johnson vs Johnson 125 Ill. 510, it appeared that the husband was the owner of property valued at $50,000.00 and had a fixed annual income of ~~$000000~~ $3000.00 and it was held that an award of $80.00 per month was not excessive.

In Porter vs Porter 162 Ill. 398, it appeared that the husband owned unincumbered property of the value of at least $40,000.00 and in addition thereto had an income from his livery business, and it was held that an allowance of $780.00 a year was not excessive.

An allowance for separate maintenance rests in the judicial discretion of the chancellor, the excercise of which is reveiewable, but

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ife for alimony varies from a sum sufficient to meet the actual wants
nd necessities of the wife, to a third or more of the husband's income."
ilbert vs Gilbert 305 Ill. 216.

In Williford vs Williford 162 Ill. app. 24, the evidence
howed that the husband was receiving a salary of $2500.00 and was the
wner of $2000.00 worth of personal property and it was held that an
llowance to the wife of the use of the homestead which the husband
wned and an award of $60.00 permonth for the support of herself and
wo minor children was not excessive.

In Robnson vs Robnson 125 Ill. 510, it appeared that the
usband was the owner of property valued at $50,000.00 and had a fixed
nual income of $40000 $3000.00 and it was held that an award of
50.00 per month was not excessive.

In Porter vs Porter 162 Ill. 398, it appeared that the
usband owned unincumbered property of the value of at least $40,000.00
nd in addition thereto had an income from his livery business, and it
as held that an allowance of $780.00 a year was not excessive.

An allowance for separate maintenance rests in the judicial
iscretion of the chancellor, the exercise of which is reviewable, but

a decree fixing the amount will not be disturbed unless there is a decided difference of opinion between the lower and the reviewing court. An Appellate Court is only justified in interfering with the allowance made by the lower court when it is clearly apparent that an unjust allowance has been made. This rule has been frequently recognized. In Foote vs Foote, 22 Ill. 425, the Supreme Court increased the amount allowed the wife for her support from $500.00 to $600.00 per annum and in addition allowed her for the support of two minor children whose custody had been awarded to her, the further sum of $400.00 per annum. It appeared in that case that the annual income of the husband was $2500.00 which was ten per cent of the value of his personal property. In Harding vs Harding, Supra, the Supreme Court modified the decree of the lower court and decreased the alimony allowed the wife from $6400.00 per annum to $300.00 per month.

In Aurand vs Aurand, 55 Ill. App. 462, the Appellate Court of the First District held that an award of $50.00 per month was excessive and reduced it to $30.00 per month, it appearing that the husband was a railway conductor earning $125.00 per month and the owner of unproductive land valued at $1350.00. This judgment of the Appellate Court was subsequently affirmed by the Supreme Court. Aurand vs Aurand, 157 Ill. 321.

In Cash vs Cash, 180 Ill. App. 31, it appeared that the net value of the property of the husband was approximately $70000.00; and that his income was $1800.00 per year; the Appellate Court reversed a decree awarding the wife $120.00 per month, and held that alimony exceeding $50.00 to $75.00 per month, would not be justified. An allowance of $75.00 per month was subsequently affirmed. Cash vs Cash, 194 Ill App. 144.

Appellant has turned over to his wife all of his household furniture and belongings. His entire savings with the exception of his interest in a lot in Florida, upon which, under his agreement of purchase, he is compelled to pay $15.00 per month, has been placed in th

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the control of his wife and she is to receive one-half of the income therefrom. If his salary is $290.00 per month he is being compelled to pay appellee one-half thereof. We are convinced that the amount allowed appellee is rather high but as this is not a final order but is subject to modification and in order to settle the controversy between the parties we prefer to affirm the decree as entered but express the opinion that the chancellor should make such a reduction in the amount of separate maintenance awarded appellee as the evidence from time to time justifies, and as is reasonable and proper. The chancellor is given authority under the law to so modify the decree. Loughi vs Loughi 193 Ill. App. 21-22.

Decree is affirmed.

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Decree is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of March in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

R. & Denied Apr. 2, 1924

3630

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

232 I.A. 634

BE IT REMEMBERED, that afterwards, to-wit: On FEB 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7271 Agenda 38

George F. Patterson,
Administrator of the
Estate of Thomas
James Monilaw, deceased,
Appellee,

vs

Elgin, Joliet and Eastern
Railway Company
Appellant.

Appeal from
Circuit Court of
Iroquois County

232 I.A. 634

Jett, J.

This is an action brought by George F. Patterson, Administrator of the estate of Thomas James Monilaw deceased, appellee, against Elgin, Joliet and Eastern Railway Company, appellant, for damages claimed to have been sustained because of the negligence of appellant in operating one of its freight trains over a public crossing where appellee's intestate lost his life. A trial of the cause was had and the jury found in favor of appellee in the sum of $8000.00. Motion for a new trial was made and overruled; judgment was rendered on the verdict of the jury for said sum and the record is brought to this court by appeal for review.

There are four counts in the declaration. The first charged general negligence; the second that no bell was rung or whistle sounded; the third alleged the violation of the speed ordinance of the village of Milford; the fourth count charged that the crossing was a dangerous one because of structures and obstructions adjacent to the railroad tracks and that appellant permitted same to remain unprotected and unguarded without reasonable warning to travelers.

Appellant demurred to the declaration and the demurrer was sustained as to the third count and overruled as to all others. The case went to the jury on the first, second, and fourth counts and the plea of the general issue with the result as heretofore stated.

On October 22, 1921, at three o'clock P. M.

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On October 22, 1921, at three o'clock p. m.

Princeton University was to play football with the University of Chicago, at Princeton, New Jersey. For the purpose of making the trip of about 900 miles to witness the game, six students from the University of Chicago namely, Thomas J. Monilaw, Louis C. Roberts Jr., Harold M. Skinner, Stanwood Johnson, H. G. Hopkins and Walter Reckless secured a second hand Buick, seven passenger automobile of the 1915 model. The six students left Chicago in the automobile in the afternoon of October 20, 1921, There is some question as to the exact hour they did leave. From Chicago they travelled south over Dixie Highway. Monilaw, appellee's intestate drove the car from Chicago the first 80 miles and just before reaching Watseka, twelve miles from the scene of the accident Hopkins took the wheel and drove the balance of the distance.

As the car in which the students were riding approached the railroad crossing between a quarter and a half a mile beyond the corporate limits of the village of Milford, in Iroquois County, it came in contact with a freight train of the appellant company and as a result of the collision Monilaw, Skinner, Johnson, and Hopkins were killed, Reckless suffered personal injuries and Roberts escaped without any injury.

In each count of the declaration it is averred that Monilaw was a passenger and was in the exercise of due care and caution for his own safety at and before the time of the accident. In order to determine whether or not Monilaw was travelling as a passenger as contended by appellee, it will be necessary to look to the testimony of the two survivors of this unfortunate occurrence. Roberts among other things testified, "I recall the automobile trip taken in October 1921, it was October 20; I started in the afternoon of that date with the young men on an automobile trip to Princeton New Jersey; we started with a seven passenger 1915 Buick, six; it was purchased by Reckless, Hopkins and Johnson; there had been some money chipped in by us to defray expenses and to go on part of the payment of the car, but the balance of the money was paid by these three men; I paid some in to pay for expenses and purchase price; the money for expenses was mostly

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that which came from Monilaw; because he had not chipped in any money on the car. We were going to use the money he had and some of our money that we had already put together. Monilaw kept the rest of the money. After the accident I removed that money from his body; the money was a common fund, the major part being given by Monilaw, the expenses were to pro-rated; it was intended on returning, to sell the car and divide up what we had among all of us; we were to travel out there together and come back together; the driving was to be done by all of us in shifts, with the exception of Reckless, who had stipulated he did not want to drive; only Hopkins and Monilaw had actually done any of the driving, and Hopkins was at the wheel at the time of the accident; we figured on fourty-four hours for the drive, it was not our intention to stop for rest, as we were going to drive in shifts; the highest speed was made sometime during Monilaw's driving, about fifty miles an hour."

Reckless testified, "I first saw the Buick car in the afternoon about 2.00, all six boys were with me; the car was purchased jointly by all six boys, but there were three of us who over 21, who signed the notes for the car; no individual member would take the responsibility himself to pay for the whole car; the buying of the car was a joint affair between the six of us; the drive we were to undertake was a joint enterprise between us six; the expenses were to be pro-rated between the six of us as far as possible including the car; we were going to try and get rid of it when we came back."

In view of the facts as disclosed by this record we are of the opinion the automobile, in which the trip was to be made to Princeton, was purchased for and in behalf of the six boys. Although Reckless, Hopkins, and Johnson executed the notes for the purchase of the automobile the six young men were equally interested in the car.

The expenses of the trip were to be borne equally by the members of the party. Monilaw had more cash than either of the other boys and was to pay the expenses out of his money, and money that had been given to him by some of the members of the party, and to keep account of the expenses and upon the return to Chicago the automobile was to be sold, the proceeds of the sale were to be applied upon the expenses of the trip.

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Rockless testified, "I first saw the Buick car in the afternoon about 2.00, all six boys were with me; the car was purchased jointly by all six boys, but there were three of us who over $1, who signed the notes for the car; no individual member would take the responsibility himself to pay for the whole car; the buying of the car was a joint affair between the six of us; the drive we were to undertake was a joint enterprise between us six; the expenses were to be pro-rated between the six of us as far as possible including the car; we were going to try and get rid of it when we came back."

In view of the facts as disclosed by this record we are of the opinion the auto bill, in which the trip was to be made to Washington, was purchased for and in behalf of the six boys. Although Rockless, Hopkins, and Johnson executed the notes for the purchase of the automobile the six young men were equally interested in the car.

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When Monilaw surrendered the wheel to Hopkins after driving the first 80 miles he got in the back seat with Roberts and Reckless. Skinner was sitting in the bottom of the car. Very shortly after this change in drivers was made they attempted to cross the tracks of the railroad company over which appellant was operating its train.

The declaration when considered in the light of the facts in this cause indicates it was a studied effort on the part of appellee to avoid the necessity of averring, that the driver of the automobile was in the exercise of due care and caution. This is shown by the fact that the declaration and each count thereof avers that Monilaw was a passenger and does not aver that the driver was in the exercise of due care and caution. If Monilaw was a passenger it was unnecessary to aver that the drifer exercised due care because a lack of such care could not be imputed to Monilaw.

Monilaw, was not a passenger, as shown by the evidence. He was engaged in a joint enterprise with Skinner, Johnson, Hopkins, Reckless and Roberts. There were no invited guests in this party. All of them were equally interested in the trip, this being so, it was necessary for the declaration to aver that the driver was in the exercise of due care and caution at the time of and immediately before the injury, that occasioned the death of appellee's intestate.

It was also necessary to prove due care on the part of Monilaw. The declaration did not aver due care upon the part of the drifer at the time of the collision and the evidence is silent on the question of due care on the part of Monilaw.

The rule adopted in this State and approved by repeated decisions requires the plaintiff in a personal injury case to prove that the person injured was in the exercise of due care at the time he sustained the injury for which damages are sought. Where the injury results in death and the suit is brought by a personal representative the personal representative must show that the deceased exercised ordinary care to avoid the injury. Petro vs Hines,, 299 Ill. 236-238, and cases therein cited.

By reason of the conclusion we have reached it is unnecessary to discuss any of the other questions raised and argued. We are, of the opinion that the judgment in this cause can not be

when Monilaw surrendered the wheel to Hopkins after driving the first 60 miles he got in the back seat with Roberts and Keckless. Skinner was sitting in the bottom of the car. Very shortly after this change in drivers was made they attempted to cross the tracks of the railroad company over which appellant was operating its train.

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sustained. The judgment of the Circuit Court of Iroquois County is reversed, and the cause remanded.

Reversed and remanded.

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Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of April in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

April

General No. 7521. Agenda No. 52.

October Term A. D. 1922.

George W. Cunningham, et al., Appellees.

vs.

United States Fidelity and Guaranty Company, Appellant.

Appeal from Champaign.

HEARD, P. J.

This is an appeal from a judgment in favor of appellees against appellant for $5000.00, debt, to be satisfied upon the payment of $5000.00, damages, in an action of debt brought upon a bond given by appellant to indemnify appellees against loss through acts of fraud or dishonesty committed by James L. Naughton as cashier of the Illinois Bank of Champaign, Illinois, a bank operated by Appellees.

Appellant contends that the instrument sued upon is not a bond, but is a limited sealed contract to indemnify or reimburse on the happening of a condition precedent and that the damages arising out of a breach thereof are unlimited damages for which an action of debt will not lie. As to the first proposition that the instrument in question is not a bond, it is sufficient to say that it is an instrument under seal, prepared by appellant and in the instrument itself it is twelve times called a "bond." Bonds of this nature are to be construed as contracts of insurance under seal and treated as such. U. S. Fidelity Co. v. First National Bank, 233 Ill. 481; Lesher v. U. S. Fidelity Co. 239 Ill. 509.

In 11 Enc. of Pl. & Pr. 377, it is said. "Debt and covenant are the appropriate form of common law actions on policies under seal. Assumpsit will not lie in such cases unless there is a new consideration, or unless permitted by statute. Debt or covenant will lie on a policy under seal renewed in accordance with

its terms by endorsement or receipt not under seal."

In 18 C. J. pg. 4, it is said upon the subject of the action of debt. "The action will lie only for the recov-

ery of a sum certain or a sum readily reducible to a certainty from fixed data or agreement or by operation of law, as distinguished from unliquidated or unascertained damages. While some confusion as to what constitutes a sum certain has arisen, probably caused by the use of such terms, as 'eo nomine,' 'in numero' and 'unliquidated damages,' yet it is clear that the action will lie, although the sum due has not been ascertained at the time the action is brought, or although the amount may depend upon a finding of the jury, as where the action is on a quantum meruit, for work and labor, materials furnished, and the like."

Even if appellees had made a mistake as to the form of action it cannot now be questioned for the reason that "an irregularity or mistake in the form or theory of action, or as to the kind of proceeding which plaintiff has instituted, in order to obtain relief is waived by pleading to the merits or proceeding to trial without objection" 31 Cyc. 730.

Appellees conducted a large supply store for students situated in the City of Urbana opposite the campus of the University of Illinois. This store, known as the U. of I. Supply Store and also as the 'Co-Op" in the period from 1915 to 1920 did a very large business; employed on the average 15 to 20 clerks at a time and sometimes took in as much as $20,000.00 a day. It was situated on a corner with four entrances opening on two streets and an alley and was usually crowded with customers.

Appellees in 1915 entered into an arrangement with the First National Bank of Champaign, established a private bank in the store, called it the Illini Bank and began to accept deposits. With students constituting the majority of its customers, the deposits of the bank grew rapidly running up as high as $200,000.00, and the number of depositors increased enormously until in

1920 when it ceased operations.

For the use of the bank a small space about twelve by fifteen feet was partitioned off from the general store room. Through this partition two doors at either

end gave access to the store. They were never locked. In the partition facing the store room were three teller windows. Behind the windows was a long shelf for the tellers and beneath the shelf at each window were cash drawers unsupplied with locks. In the bank was a roll top desk, a typewriter desk, a table, a metal safe cabinet, for books and a large safe on wheels. The cabinet was locked with a combination lock. The outside door of the safe was locked with a combination lock, the thin inside doors with a key. Within the inside doors was a small vault about six inches by six inches by fifteen inches in the dimensions secured by a time lock. Both the books of the store and of the bank were kept in compartments in the cabinet and in the safe. The undeposited money of the store was kept in the safe. The money of the Illini Bank, not required for daily use and not deposited in the First National Bank, was kept in the drawers at the teller's windows and in the vault in the safe. It sometimes overflowed into the other compartments. The cabinet, the safe and the vault were usually unlocked at eight o'clock in the morning and remained unlocked throughout the day.

Excepting the cashier, the bank was operated by student employees who attended classes and gave to it only part of their time. Normally, while the University was in session the bank required the services of three tellers, sometimes a fourth, and as each teller worked only part of the time four or five employees were required to fill the positions. The number of employees varied, the number sometimes running as high as 18. All had access to the cabinet and safe and the vault. The tellers continuously throughout the day used the vault in putting away large deposits or in obtaining reserves for use at their windows. The bookkeeper and stenographer of the store, at least two in number, and the bookkeepers of the bank used both cabinet and sale in storing and

removing the books of account in the daily conduct of the business. No check of money was taken when one part time teller relieved another. There were no cages or other divisions seperating the tellers and

their respective cash drawers from each other, or from the rest of the bank. The janitor, two student watchmen who slept in the bank at night and occasionally assisted in posting the books, the Cunningham Brothers, two or three store and two bank employees, had keys to the store building and access to the bank. Naughtin's back was to the safe when he was seated at his desk. The teller, Jefferies, the Cunningham Brothers and Naughtin all had the combination to the safe.

On the morning of December 27, 1917, W. C. Clifford, cashier of the Illini Bank went into the army. About 8:30 o'clock he went to Naughtin and told him he was to take charge of the bank. Clifford was leaving immediately and the windows of the bank were to open within thirty minutes. Naughtin and Clifford hurriedly counted the cash on hand and the clearing items that were to be collected at other banks. The cash, including cash items, checked with the figures which Clifford had placed on the daily sheet as indicating the cash which should be on hand. Clifford left and Naughtin took charge of the bank and from that time until his discharge by appellees, he had, as he testifies, "Complete charge of the accounts of the bank and no one else had supervision over the doing of the work and the correct accounting of the funds.

During each day in the conduct of the business of the bank it received checks, moneys and other funds, and paid out money memoranda being made of the details of the transaction, deposit slips operating as memoranda of the deposits. At the close of the day from the memoranda and cash on hand and from the checks that had been cashed they would get totals of the amounts that had come in and the amounts that had gone out. Then these totals were entered on a daily cash sheet. The cash sheets have debit and credit columns. The things that the bank received to its benefit were totaled in the debit column. The debit side is made up from

the aggregate information from the tellers and the records on hand and similar items; the totals are made from the memoranda on hand, and on the credit side are placed the deposits. Then the two sides are totaled, the

difference found which added to or taken from as the case may be, the cash on hand at the close of the previous days business would leave a balance which represented the amount of the cash on hand. At the close of the day all writing showing the different items of the day's work would be put together with a rubber band, dated and preserved. Those are the original entries of the day's transactions. In the evening the daily cash sheet merely contains totals, and is a summary of the day's transactions taken in greater part from the daily memoranda.

Some question having arisen as to the correctness of the banks accounts, Prof. H. T. Scovill for three years professor of accountancy of the University of Illinois, a graduate of the University in 1908, an instructor for six years and a certified public accountant with five years continuous service in Chicago as public accountant auditing the accounts of industrial plants and banks, was secured by appellee to make an audit of the banks books and accounts.

Prof. Scovill began his audit April 1, 1920 and about May 30, 1920 he submitted to the proprietors of the bank a typewritten report of nine pages single spaced together with thirteen schedules designated Schedules A to M. This entire report and the schedules were offered in evidence, but were objected to, and Schedule M was offered separately and admitted. Prof. Scovill testified that the data shown by the schedule was obtained from the cash sheets, and that it correctly sets forth what is shown by examination of the same cash sheets as to the matter of cash shortages and overages in the accounts of the Illini Bank, as disclosed by those sheets, and shows that at the time of the count there was a shortage of cash of $11,685.49.

It is contended by appellant that this schedule M was not admissible in evidence. This schedule was based on an examination of the cash sheets kept by Naughton and was properly admitted in evidence. In People v. Sawhill 299 Ill. 403, it was said. "It would be impossible for the jury to carry the numerous figures in their minds if merely read off to them by the witness, and it

would be impractable for the jurors to transcribe them for the purpose of adding them up themselves during the trial. It has, therefore, been held that it is the discretion of the Court to admit such statements or schedules of figures or the results of examination of numerous documents or account books to be introduced in evidence, such statements, schedules or results to be verified by the testimony of the witness by whom they were prepared."

Naughton assumed the duties of cashier December 27, 1917 and the bond was given January 26, 1918. Appellant insists that there is no evidence tending to show that the alleged shortage occurred during the period covered by the bond. No evidence is offered tending to show that the shortage occurred prior to January 26, 1918. Naughton when he assumed control counted the cash and checked up the securities and there is evidence to the effect that after January 26, 1918 at different times said to one of appellees that "the books balanced today."

It is contended by appellant that the evidence fails to show a breach of the bond and that the verdict was contrary to the evidence. That there was a shortage in the Bank's assets at the date of the audit, greater than the amount of the judgment, is not denied. Although Naughton was a witness for appellant and the books and accounts were examined for appellant by two experts, one of whom testified, although Naughton had complete charge of the accounts of the bank and exclusive supervision of its funds he never reported any shortage prior to the time of the audit, but on the contrary assured appellees at times that his books balanced. On August 19, 1919, the cash on hand appeared

as $12,776.92. On August 20, $1,731.92, was paid out. Substracting that, there should have been on hand at the close of business the sum of $11,045.00 as a result of the transaction recorded on this sheet, which is not balanced. Instead of that amount the amount of $3,683.00 was carried forward to begin business with on Aug. 21, a difference of $7,362. Naughton fails entirely to give any plausible explanation

of the discrepancy which occurred just the day before he went on a vacation. This sheet bears Naughton's O. K. and the figures $3683 were according to the testimony of the man who took his place, while on vacation, given to him by Naughton, as the figures to start that days work, in order to arrive at a balance for the days business. * * * * and which figures represented by actual count the amount of cash on hand when the substitute commenced work at the beginning of business on August 21, 1919.

When Naughton was called upon by Scovill and informed that an audit was about to be made the evidence tends to show that Naughton sought to have the audit postponed until after the close of the University, which closed about the middle of June. When this delay was refused he told Prof. Scovill that the records were not ready; that they were not balanced, and that he would take them home and work on them that night, and have them ready the next day; that he did not produce them the next day, and when they were finally produced, they showed a great many fresh ink entries, erasures and alterations which Naughton explained by saying that he had to get them balanced up and had to make them balance. Scovill testifies that he did not find any blotter book containing a summary of the cash items during Naughton's period and that Naughton told him that they were in a black book which had been lost and could not be found. Witness Jeffries testifies that this book was kept in Naughton's private desk, which was kept locked, Naughton keeping the key and that he saw this book while Scovill was making his audit.

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At the beginning of the audit Naughton produced to Scovill what purported to be the other assets of the bank. About two days later he produced to him two notes of $1000.00 each, each bearing date January 23, 1919, one signed by Naughton and the other by a brother of Naughton. The brother's note was paid prior to the trial and the one signed by Naughton during the trial. Scovill says of these notes. The dates appearing at the top were there and the ink marks appearing on the face of the revenue stamp. In my work as an ac-

countant I have had experience in determining the freshness of ink; I think I am able to determine when ink is freshly written. The ink on these two papers does not have the same appearance as it had when I first saw them. It was of a bluish color at that time. The ink was fresh on those notes when it was handed to me. Ink of that character will remain blue not more than five days. I think they would call the ink a blue-black ink. I do not know what kind of a bottle it came from. I was auditing the books and noticed that the writing was blue; that indicated to me that the notes were not made when they were dated." While there is no direct evidence that the shortage was caused by Naughton appropriating the funds or property of the bank to his own use, yet when all the circumstances in evidence are considered, we are of the opinion that the verdict of the jury was fully warranted. While there is evidence which tends to reduce the amounts of the shortage from the amount stated by Scovill, yet these items do not reduce the amount below $5,000.00, the amount of the verdict.

Complaint is made that the court erred in excluding evidence offered on behalf of appellant. We find no reversible error in that respect.

Certain instructions informed the jury that it might assess the plaintiff damages covering all pecuniary loss sustained by the plaintiff out of the "money securities or other personal property etc. etc." It is contended by appellants that by the issue made by the pleadings the appellee's suit is to recover only

for the pecuniary loss sustained by Naughton's alleged embezzlement of money.

The contract provides that the appellant "Reimburse the employer to the extent of $5,000.00 and no further for all pecuniary loss sustained by the employer of money, securities or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty committed by the employee in the performance of the duties of the office or position in the service of said employer as aforementioned and occurring during the continuance

of this bond, etc. etc." Appellee's declaration, as the specific allegation of the breach of the appellant's contract upon which they base their cause of action, charges that Naughtin after the execution of the bond and prior to June 1, 1920, "Did fraudulently and dishonestly misappropriate and convert to his own use the sum of to-wit, $10,000.00 etc. etc." and "did fraudulently and dishonestly misappropriate out of the moneys and securities of the plaintiffs in the possession of the said James L. Naughtin, as such employe, or for the possession of which he was then and there responsible as such employe, and did convert to his own use the sum of to-wit, $10,000.00, the said fraudulent and dishonest conduct of him, the said James L. Naughtin, being then and there committed by him in the performance of the duties of the position of cashier, in the service of said plaintiffs." Appellants common traverse specifically denied the appellee's averments as follows. "That the said James L. Naughtin after the execution of the instrument set out in plaintiff's declaration and prior to the first day of June, A. D. 1920, did not fraudulently and dishonestly misappropriate and convert to his own use the sum of to-wit, $10,000.00, out of the funds of the Illini Bank, etc. etc. * * * * and did not fraudulently and dishonestly misappropriate out of the moneys and securities of the plaintiff etc."

It will be, therefore radily seen that under the pleadings and evidence appellees were not confined to a recovery only for pecuniary

loss sustained by Naughtin's alleged embezzlement of money.

Complaint is made as to the courts ruling upon other instructions. To go into the details of each instruction would prolong this opinion unduly. Suffice it to say that we have examined the instructions with reference to which complaint is made and find that the jury were fully and fairly instructed and that no reversible error was committed by the court in the giving or refusal of instructions.

The Judgment is affirmed.

General No. 7567 Agenda No. 13.

April Term A. D. 1923

G. Matalone, Appellant,

vs.

Filippo Ciardi, Appellee.

Appeal from Fulton.

HEARD, P. J.

The appellant, G. Matalone, is a co-partnership composed of Fred Matalone and Steve Matalone, doing business under the name of G. Matalone, in the City of Chicago, dealing in Italian groceries, wines, liquors, cordials, oils and other products.

The appellee, Filippo Ciardi, resides in the City of Farmington, in Farmington Township, Fulton County, Illinois. The transactions involved in this case cover a period from the 13th of December, 1917, to the 5th day of March, 1919. During that time the appellant shipped to appellee, who conducted a soft drink parlor, seven shipments consisting principally of wines, which were delivered to the C. B. & Q. R. R. Company in Chicago on the following dates: December 12, 1917; April 23, 1918, June 4, 1918, July 26, 1918, September 3, 1918, October 7, 1918, December 2, 1918.

There is no dispute whatever in the record in the evidence concerning the sale, shipment or receipt of the goods, nor is the amount of the bill of any shipment in any way denied by the appellee.

The appellants filed as their declaration the common counts with affidavit of claims. To this declaration were pleaded three pleas. The first was the general issue accompanied

by an affidavit of merits. Later two additional pleas were filed. The first was to the effect that the order for the goods sued upon was for intoxicating liquors, and that the same was taken and the agreement for the sale and delivery of the same was made in the Town of Farmington, Fulton County, Illinois, while the Town of Farmington was anti-saloon territory. The second additional plea was to the effect that Farmington Township was anti-saloon territory and

that the plaintiff or their agent, advised and encouraged the defendant to receive the goods sued upon for the purpose of re-selling the same within anti-saloon territory in violation of the law. These pleas were supported by an affidavit of merits.

A demurrer to the second and third pleas was interposed and overruled by the Court. Evidence was heard on a trial before the court, a jury being waived, the issues found for appellee, judgment rendered accordingly and this appeal taken.

It appeared from the evidence that the orders for the goods sued upon and so sold, were taken in Farmington Township, Fulton County, Illinois, by an agent of appellants by the name of Pettrucci; that such orders when taken by the agent were forwarded to the City of Chicago, where it was determined by the appellants whether or not they would accept the orders and make the shipments.

In support of the contention of the defendant that Farmington Township at the time was anti-saloon territory, the defendant offered in evidence the following records:

"April 8, 1914.

The canvassing Board met Wednesday April 8, 1914, at 8 P. M., at office of town clerk to canvass the returns of the election of April 7, 1914. Members present —Supervisor Short, Assessor Scudder.

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After canvassing the returns it was found that the numbers set opposite the names of the various candidates on the various poll books was correct and declared the following named elected by the following votes:

~~Shall this~~ Town become anti-saloon territory.

Yes—seven~~hundred~~ and eighty. Yes 780.

No—six hunde~~red~~ and thirty-five. No 635."

April 7, 1914.

"At the annual town election, held at the City Building in Precinct No. 1; at the Picton restaurant room on West Fort Street in Precinct No. 2, and in the Village Building in the Village of Norris, in the County of Fulton, and State of Illinois, on the 7th day of April 1914, the polls of said election having been duly opened

at 7:00 a. m. after proclamation thereof having been made, the following named persons, after a canvass of the vote, were found to have received the number of votes set opposite their names for the following offices in the Town of Farmington:

Shall this Town become anti-saloon territory.

Yes—seven hundred and eighty. Yes 780.

No—six hundred and thirty-five. No 635."

Objection was made to the sufficiency of the record, whereupon the town clerk, Alson W. Brown, who was testifying to the record, was withdrawn from the stand and then and there amended the record, by inserting the name of Alson W. Brown among the members present, and inserting the words, "And that the votes on the following propositions were as follows" before the words "Shall this Town become anti-saloon territory," in the first record and the words "and upon a canvass of the votes cast at said election on the following propositions the result thereon were as follows," before the words, "Shall this Town become anti-

saloon territory," in the second certificate when the record was amended. The record as amended was tendered in evidence by the appellee and addmitted over the objection of the appellant.

The Dram Shop Act in force at that time provided: "The Clerk shall record in a well-bound book, to be kept in his office by himself and his successors, the result of the vote upon said proposition, and such result may be proved in all courts and in all proceedings by such record or by the official certificate of the clerk; and in cases where such a record or certificate shows that a majority of the legal voters voting upon said proposition voted "yes", the same shall be prima facie evidence that the political subdivision to which such vote was applicable has become anti-saloon territory."

It is contended by appellants that no proper relord of the canvass of the votes of the election having been made by the Town Clerk, Farmington Township never became anti-saloon territory and in support of this contention cites many authorities from other jurisdiction to

the effect that it is essential to the validity of an election under the local option law that there should at least be a substantial compliance with the statutory directions as to canvassing the votes and as to the officers who are to perform that duty and that a record of such election or adoption of the provisions of the law be made before the taking effect of such act. An examination of these authorities disclosed the fact that they are largely cases when the act or ordinance adopted in terms provided for its taking effect after its recording or publication and are therefore not in point in the present case.

The taking effect of the provisions of the Illinois Anti-saloon law did not depend upon the ministerial act of any official but depended upon the vote of the people. Otherwise a

town clerk by failing to record the result of the vote upon the proposition and concealing himself so that process could not be served upon him could frustrate the will of the people and could effectually prevent a given territory from ever becoming anti-saloon territory.

In this state the will of the people is regarded as of much greater importance than any technicalities, and the Supreme Court in The People v. Green, 265 Ill. 39 has wisely said, "In reaching the correct results in proper proceedings in election matters very little attention is paid to mere irregularities in the acts of election officers which do not affect the real merits of the case. If the statute expressly declares any particular act to be essential to the validity of the election or that its omission shall render the election void the courts must enforce the provisions of such statute, but in cases where the statute simply declares that certain things shall be done within a particular time or in a particular manner and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they affect the actual merits of the case, but they will be considered directory, only, and not vital to the election, unless they are such in themselves, as to change or render doubtful the result (McCrary on

Elections 4th ed. secs. 221, 225, 227.) The provisions of statutes which control the "Recording and return of the legal voters received and the mode and manner of conducting the mere details of the election are directory." (McCrary on Elections 4th ed. sec. 228.) * * * The will of the people should not be defeated by useless forms or idle technicalities.

It is likewise to be noted that the statute in question did not require a certificate of the canvassing board to be recorded by the town clerk, but only required him to record the "result of the vote upon said proposition."

The Town Clerk testified, "I was present at the time the canvass was taken of that vote and acted as clerk of the canvassing board at that time. I know that there was a canvass of the votes on the proposition "shall this town become anti-saloon territory." The results of that canvass were placed on my record at that time."

Moreover the legislature did not leave the time of the taking effect of the vote upon this proposition open for judicial construction or dependant upon the failure of a ministerial officer to do his duty, but in the act in question provided in Sec. 3 thereof, "A vote under the provisions of this act shall become operative on the thirtieth day after the day of the election at which such vote is cast."

We are of the opinion that the evidence clearly shows that at the time of the taking of the orders in question Farmington Township, in which they were solicited and taken, was anti-saloon territory.

It is contended by appellants that even though Farmington Township at the time of taking the orders be held to be anti-saloon territory at that time intoxicating liquors were recognized as subject of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decision of the courts, and that the order having been sent to Chicago, which was wet territory, for approval and the order having been accepted, filled and the goods delivered to a common carrier in wet territory for

shipment to appellee that therefore the sale and delivery was consumated in wet territory and was not in violation of law. Appellants cite the Uniform Sales Act and many authorities to the effect that delivery of goods to a common carrier, to be conveyed to the vendee, is equivalent to a delivery to the purchaser, and vests the title in him. There can be no question but what in the absence of contract or statutory regulation this is the general rule, neither can there be any question but what the legislature under its police powers can, with reference to the sale and delivery of intoxicating liquor change the general rule.

Sec. 13 of the act in question provided that the taking of orders at or within anti-saloon territory, for the sale or delivery of any intoxicating liquor 'shall be held to be an unlawful selling." The Supreme Court in construing this section in the People v. Steinhauer, 248 Ill. 46, said; "The liquor traffic is subject to such policy regulations as the legislature may see fit to adopt, and it cannot be doubted that it is within the power of the legislature to prohibit the taking of orders in anti-saloon territory for the sale or delivery of intoxicating liquor. This has been done by providing that such taking of orders shall constitute an unlawful selling within tne meaning of the act."

The evidence shows that the major portion of appellants claim is based upon illegal sale of intoxicating liquor and on such portion of the claim, upon principles of public policy and to conserve the public welfare they cannot be allowed to recover. Fields v. Brown, 188 Ill. 111.

The evidence shows that two empty half barrels of the value of $4.00 were shipped by appellants to appellee and it is contended by appellants that in any event they were entitled to

recover therefor. urom the condition of the record in this case we are unable to say that there is any merit in this contention. The evidence shows payment in amounts greater than $4.00 which could have been applied in payment of these items. Appellees filed an affidavit of merits which is not abstract-

ed and as the court will not go beyond the abstract to search the record to find error we cannot say that this defense was not set up in the affidavit of merits. Neither does it appear from the abstract that these items were included in appellants' statement of claim. Appellants in the trial court asked the court to rule on fifteen propositions of law and in none of them called attention to these items.

So far as we are advised by the abstract no error was committed by the Circuit Court and its judgment is affirmed.

General No. 7574. Agenda No. 19.

April Term A. D. 1923

Otis Slater & Sons, Appellees,

vs.

Baltimore & Ohio Railroad Company, Appellant.

Appeal from Christian.

HEARD, P. J.

This is an appeal from a judgment of the Circuit Court of Christian County, in favor of appellees against appellant for $575 damages to a Ford truck as the result of the truck being struck by a freight train on appellant's road at a public highway crossing near Pana, Illinois, at about six o'clock in the morning of July 19, 1920.

Appellee's declaration consisted of three counts of which the first alleged that the appellant so negligently operated its train that it struck appellee's truck. The second count was based on an alleged failure to give the statutory signals by ringing a bell or sounding a whistle on approaching the crossing in question. Both these counts alleged due care on the part of the driver of the truck at the crossing, but neither of them alleged the exercise of ordinary care on his part in approaching the crossing or prior to the time of the accident. The third count appears to be an attempted compound of trespass and trover but in fact does not correctly state a cause of action in either.

One of appellants defenses was contributory negligence on the part of the driver of the truck. In this state of the record the court instructed the jury at the request of appellee.

"The court instructs the jury that if the plaintiffs

have proven their case, as charged in the declaration, by a preponderance or the greater weight of the evidence, the jury should, by its verdict, find the issues for the plaintiff and assess such damages, if any, as may be shown by the preponderance of the evidence the plaintiffs have sustained."

The giving of similar instructions where the declar-

General No. 7580. Agenda No. 55.

April Term A. D. 1923

James M. Emmons, Administrator of the Estate of James S. Emmons, Deceased, Appellee,

vs.

Jacksonville Railway and Light Company, a Corporation, Appellant.

Appeal from Morgan.

232 I.A. 635

HEARD, P. J.

This is a suit brought by James M. Emmons as administrator of the Estate of James S. Emmons, deceased, against the Jacksonville Railway and Light Company, on a plea of trespass on the case.

The declaration charges that the Jacksonville Railway & Light Company, defendant, was on the 9th day of April, A. D. 1922, engaged in the business of manufacturing, selling and distributing electrical current for lighting and power purposes in Jacksonville, Illinois.

That on said date the defendant company owned and maintained poles and electric wires on the premises known as the Tendrick Brick Yard in Jacksonville, and that the said company owned and maintained two poles with wire strung thereon at the east end of a box car on said premises which said poles were about eight feet apart and the wires about nine feet from the ground. That between the said poles the defendant company maintained a box of apparatus for receiving high tension electrical current which said box was uninclosed; that the said defendant company had negligently permitted the wires then and there to remain and be live wires carrying high voltage of electrical current and had negligently permitted said wires to remain without proper insulation and uninclosed for more than one year prior to

the date of the death of James S. Emmons; that the said uninsulated live wires were located at a place at the Tendick Brick Yard easily accessible to adults and children; that children could easily pass, by reason of large heaps of rubbish and brick bats piled near to a low building adjacent to said box car at the

end of which the company maintained the said poles and uninsulated live wires, transformer cutouts and platform which were about one foot from the said box car. That for more than a year prior to the death of James S. Emmons, that he and other neighborhood children were accustomed to play in and about the rubbish piles, low building and box car, on the premises known as the Tendick Brick Yard.

That on the 9th day of April, 1922, the said boy James S. Emmons, deceased, about eight years of age, in company with other children, were playing in and about the Tendick Brick Yard Premises and that the said Emmons boy, while on top of the box car and near the poles and box or apparatus of the defendant company's, in some manner reached, touched or come in contact with the live wires in the box or apparatus so negligently then and there maintained by the said defendant company; that he was by reason thereof, instantly killed.

A trial resulted in a judgment for $4000.00 and costs from which judgment this appeal has been taken.

The first error complained of is that in ruling during appellants opening statement, in his ruling on the admission of evidence and in refusing instructions, the court held that the question of care on the part of the parents of deceased was not material. The parents of deceased being beneficiaries for whose benefits the suit was brought and want of care on their part which proximately contributed to bring about the accident would bar a recovery. Hazel v. H. B. M. B. Co. No. 7529 3rd Dist._____Ill. App._____ and cases therein cited.

Appellant also offered the testimony of an expert that the installation at the Tendick brickyard as to location of cross-

arm bars, type of transformer cut-outs, insulation of wires, clearance, manner of disconnecting plugs, manner of providing plants with transformer cut-outs, and the practice of removing same when the machinery was not in actual operation, was the usual and customary type of installation, manner of installing and operating, and were in general use through-

out the country, and were all in accordance with the approved rules and practice as outlined by the National Electrical Association and by the Bureau of Standards of the United States Government in their safety code. All of such evidence was excluded by the Court, and defendant was not permitted to ask any questions bearing upon those matters. This evidence was competent as bearing upon the question of the exercise of ordinary care for the safety of others on the part of appellant. Pressly v. Normal Ry. Co. 271 Ill. 622.

Eddie Myers a boy 7 1-2 years of age at the time of the accident, who was allowed to testify over appellant's objections without sufficiently demonstrating his knowledge of the nature and obligation of an oath and the penalty for its violation, was sought to be impeached by showing that at the coroner's inquest he had made statements under oath different from those made upon the trial. After having been interrogated as to his having made those statements at the coroner's inquest and the witness having denied making them. Appellant sought to introduce in evidence a portion of witness es evidence given at the inquest in writing, signed by him, but the court refused to allow the introduction of the same, the objection being that it was "not a paper that was required to be filed anywhere." Appellant was seeking to follow one of the approved methods of impeaching a witness by showing that the witness had made statement outside of court differing from those made upon the witness stand and it made absolutely no difference whether the signed statement was a paper required to be filed any where or not.

Appellee introduced evidence tending to show that a number

of boys frequently played within the enclosure with in which was situated the electrical apparatus in question. When appellant sought to prove by the owner of the enclosure that whenever he saw any boys in there he ordered them out, the court sustained an objection to such testimony. This testimony was competent as tending to show the rightful use of the premises and as bearing upon the question of the amount

of care required of appellant.

One of the points set up in the declaration and with reference to which considerable testimony was taken was the existence of a pile of bricks and the shed in proximity to the box car, but there is no testimony whatever in this case that deceased got on the box car in that manner or that the shed or bricks had any thing whatever to do with the accident. While in the brief they are referred to as an attractive nuisance it is rightfully conceded by appellee in their argument that the doctrine of attractive nuisance does not apply to the facts of this case as follows. "The authorities cited and argument made by appellant's attorneys, relative to the doctrine of attractive unisances are without merit and have no application to the facts proven in this case. the doctrine of attractive nuisances are without merit case where the defendant is the owner of or controls the premises whereon the attractive nusiance is supposed to exist. It is not claimed in the declaration that the apparatus or box containing live wires and maintained on the Tendick Brick Yard premises was the thing that attracted the deceased and other children to the premises."

The evidence showed that appellee maintained poles and electric wires strung thereon for the purpose of conveying electrical current to the Tendick Brick Yard; that appellant then maintained two poles about eight feet apart; that between said poles and a little over 7 feet from the ground was a platform consisting of six planks and about four feet in width; that between the posts 10 feet 6 inches from the ground was a cross arm bar

5 inches thick; that from a cross arm on one of the poles were three wires leading down to the cross arm between the poles; that on this cross arm were four porcelain transformer cut out boxes; that the transformer cut outs were necessary to safeguard from overloading or short circuits and to protect appellant's power plant; that the platform in question was from 13 to 17 inches from the top of the box car and some higher; that the operation of the brickyard had been temporarily dis-

continued because of high labor cost; that operation had not been permanently discontinued and that the defendant had never been notified that the operation was permanently discontinued nor notified to remove its apparatus; that at the time of the accident Tendick was at work preparing to resume operation of his brickyard, and that he did resume operation shortly after the accident; that when the operation of the plant was discontinued the cutout plugs containing the fuse was taken out to disconnect the current; that when these plugs were taken out about 1-2 inch inside the bottom of the porcelain box so situated that a person could not come in contact with it if a hand was laid flat on the bottom of the porcelain box was alive contact point which was not insulated and which by reason of its purpose could not be insulated when in use; that deceased came to his death by getting his thumb in contact with one of these live contact points.

The only witness who testified to seeing the accident was Eddie Myers, the witness above referred to, who testified that deceased was on top of the box car and stepped on the platform; that when he had one foot on the platform he started to fall and grabbed the tin box; that he got his thumb in it; that he saw fire come out of the mouth of the deceased and then he fell down on the ground. I just saw him put his hand up there, that made me think he was falling. He admitted on cross exemination that at the coroner's inquest he had testified, "James Emmons climbed out on to the scaffold which extended between two light poles,—while standing on the scaffold with one foot on the box car thrust his right thumb into a little black box."

The electrical apparatus of appellant is not alleged to have been an attractive nuisance and as before stated the doctrine of attractive nuisance is concede not to apply. The platform was for the sole use of appellants servants and was premises of which appellants had the sole possession. No person other than appellant's servants had a right thereon and when deceased stepped thereon he was a tresspasser to whom appellant owed no duty, except the duty of not wantonly or wilfully in-

juring him and the declaration in this case is not based upon a wilful or wanton injury.

In Austin v. Puplic Service Co. 299 Ill. 112, the court said, "With the advance of civilization electricity has become a necessity, and in order to make it useful to man it must be carried from place to place. The restrictions governing the handling of this commodity by public or private corporation or by individuals must, in view of its commercial and domestic importance, be reasonable. One engaged in the business of manufacturing, transmitting and distributing electric current is only required to exercise such care and caution as a person of ordinary prudence might reasonably be expected to exercise in the handling of such a silent and dangerous agency under similar circumstances, and if he places his wires in such a position that they will not inflict injury on a person in the exercise of his rights and privileges while he is using due care and caution for his own safety, he has fully performed the duty which the law imposes upon him * * * * *. Persons engaged in the transmission of electricity are not insurers of the safety of the public, but they are bound to know the dangers incident to handling electricity and to guard against such dangers by the exercise of care commensurate with them * * * * In order to charge a person engaged in the business of handling electric current with liability, it is necessary that the injury which results from such dangerous agency be one which a person of ordinary prudence, in the light of the surorunding circumstances, would reasonably and naturally have anticipated. (Kempf v. Spokane and Inland Empire Railroad Co. 82, Wash. 263, 144 Pac. 77; Wetherby v.

Twin State Gas and Electric Co. 83 Vt. 189, 75 Atl. 8; O'Gara v. Philadelphia Electric Co. 244 Pa. 156, 90 Atl. 529).

The court in instructing the jury entirely disregarded the principles above announced, gave instructions for appellee in conflict therewith and refused two instructions asked by appellant which were couched in the exact language above quoted.

Deceased having been a trespasser upon appellant's

premises at the time he met his death is not entitled to recover under the declaration and evidence in this case and the judgment of the Circuit Court is reversed.

Finding of facts. We find that at the time deceased met his death he was on appellant's premises and that appellant did not wilfully or wantonly injure him, and appellant was not guilty of negligence.

General No. 7582. Agenda No. 25.

April Term A. D. 1923

Village of Wenonah, Appellee,

vs.

Peabody Coal Company, Appellant.

Appeal from Montgomery

232 Ill. 69

HEARD, P. J.

This is an appeal from a judgment of the Circuit Court of Montgomery County entered on July 18, 1922, in a suit by the appellee, Village of Wenonah, against the appellant, Peabody Coal Company, and the Illinos Coal Properties, T. C. Keller, agent. The case was tried by a jury and the jury found the Illinois Coal Properties, T. C. Keller, agent, not guilty, and returned a verdict against appellant for the sum of three thousand seven hunderd eight dollars and forty cents.

The declaration was in case and consisted of two counts, in the general terms alleging that the appellee, Village of Wenonah, was in the possession of certain streets on or about July 1, 1917, and that for many years prior thereto the defendants were possessed of, using and operating a coal mine adjacent thereto; that the defendants operated the mine and removed the coal from said mine underlying the surface of said streets, and that it became the duty of the defendants to leave in the place of the coal removed sufficient support to maintain the surface of said streets in its natural state, but that disregarding their duty in that behalf, failed to furnish or leave sufficient support underneath said streets, and by reason thereof the streets settled and subsided to a depth of, to-wit, four feet, and injured the same.

The defendants filed joint pleas of the general issue and five years Statute of Limitations, and each defendant filed a

separate plea that they were not in possession of and did not have use, management or operation of the coal mine at the time of the commission of the grievances charged in each count of the declaration.

It is contended by appellant that the verdict was contrary to the evidence in the case. The evidence in the case is very voluminous, but when it is carefully read and analyzed there is but little conflict in it. There is no question but what the surface of the land at the point in dispute began to sink in the summer of 1917, and that the subsided area was about 600 feet by 350 feet in extent and that the subsidence was caused by mining operations directly under the subsided area.

The evidence shows that the mine was opened by the Peabody Coal Company about the year 1909. Some of the main entries were driven and a little coal around the shaft removed. The mine was then sold by Peabody Coal Company to the Chicago & Eastern Illinois Railroad Company in the year 1912. The railroad Company did not operate the mine itself, but leased the same to the Peabody Coal Company, appellant, on May 1, 1912, and as such lessee, the Peabody Coal Company operated the mine to December 1, 1914 and never at any time thereafter had anything to do with the possession, use, operation or ownership of the mine. About this time, the Chicago and Eastern Illinois Railroad Company went into the hands of a Receiver. By a proceeding filed in the District Court of the United States for the Northern District of Illinois in Chicago, Honorable George A. Carpenter, Judge, entered an order or decree on November 25, 1914, ordering a cancellation of all of the coal leases of the Chicago & Eastern Illinois Railroad Company, the cancellation to become effective November 30, 1914. This

terminated the lease of the appellant, Peabody Coal Company, on that date. By the same order, Francis S. Peabody, Jackson K. Deering and Jabez Wooley were appointed Receivers of all of the coal mines owned by that railroad company and the Receivers were directed to take possession of the mines on November 30, 1914, and to operate the same. Under this order, the said Receivers operated the mine to March 31, 1916, at which time, the same Judge of the same court, by virtue of an order issued on March 16, 1916, accepted the resignation of Peabody, Deering and

Wooley as Receivers of the coal property of the Chicago & Eastern Illinois Railroad Company, which included this mine, and appointed Theodore C. Keller, as Receiver of the coal properties of said railroad company, as successor to Peabody, Wooley and Deering and directed Mr. Keller, as said Receiver, to take possession of the mines at midnight March 31, 1916, and directed him to operate and manage this coal mine. Under this order of the Federal Court T. C. Keller as receiver, operated the mine from April 1, 1916, to December 18, 1917.

This is not a case where the rule of res ipsa loquitur applied by reason of the subsidence. Appellant was not in the control, management or operation of the mine. Liability cannot rest upon imagination, speculation or conjecture, nor upon a choice between two views equally compatible with the evidence, but, must be based on facts established by evidence fairly tending to prove them. Vulcan Det. Co. v. Ind. Comm. 295 Ill. 141. Burns vs. C. & A. R R Co. 223 Ill. App. 439. The evidence must not only show that defendant was guilty of the specific charge alleged in some count of the declaration, but the evidence must also show that such acts or neglect was the proximate cause of the subsidence of the land in question.

This case seems to have been tried upon the theory that if appellant removed any of the coal from underneath the subsided area, and this area afterwards subsided by reason of the wrongful methods of appellant's successor, that this made appellant a joint tort feasor with his successor, even though appellant's methods were proper and the land in no danger of subsiding when appellant ceased operations and instructions from which the jury could readily infer this to be the law were given the jury.

This is not the law. Even if appellant had been negligent in its operations, it could only be held liable if its negligence was the proximate cause of the subsidence and the negligence of a defendant is the proximate cause of an injury, only if it can be properly said to have produced the result complained of in natural and continuous sequence, unbroken by any efficient intervening

cause. McClure v. Hoopestown Gas Co. 303 Ill. 89. The opinion in this case quoted from A. T. & S. F. R. R Co. vs Stanford, 12 Kan. 354, as follows:—'Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and if they are such as might with reasonable diligence have been forseen, the last result, as well as the first and every intermediate result, is to be considered, in law, as the proximate result of the first wrong cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which would not have been foreseen by the exercise of reasonable diligence by the wrongdoer and except for which the final injurious consequence could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action. In Milwaukee and St. Paul Railway

Co. v. Kellogg, 94 U. S. 469, it is said: 'The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * The inquiry must, therefore, always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury."

The undisputed evidence is that appellant quit operating the mine and that when it ceased operations there was no danger whatever that the area in question would or could subside, and in this state of the record we must hold under the authorities cited that the acts of appellant were not shown by the evidence to be the proximate cause of the subsidence.

The judgment of the Circuit court is therefore reversed and the cause remanded.

General No. 7595. Agenda No. 34.

April Term A. D. 1923

Lewis A. Hirsch, et al, Appellants,

vs.

Robert H. Downing, Appellee.

Appeal from Logan.

HEARD, P. J.

This purports to be an appeal from the Circuit Court of Logan County. Appellant filed in this court what purports to be an abstract, but which does not show any of the questions involved in the litigation nor how such questions arose. It does not even show that a judgment was rendered in the court below or show any action of the Circuit Court, from which an appeal could be taken.

The appeal will therefore be dismissed in accordance with the rule of this court.

General No. 7599. Agenda No. 37.

April Term A. D. 1923

John J. McGowan, Administrator of the Estate of Jeannette McGowan, Deceased, Appellee,

vs.

Alfred W. Taylor, Appellant.

Appeal from Sangamon.

HEARD, P. J.

This is an appeal from a judgment for $3000.00 in favor of appellee for damages occasioned by the death of Jeanette McGowan who died as a result of having been struck by appellant's automobile.

Appellee's declaration consisted of three counts. The first count charged appellant with general negligence in driving his automobile and failing to keep it under control. The second count was a statutory speed count and the third count charged appellant with negligence in failing to give reasonable warning of his approach. Each of the counts alleged due care and caution on the part of deceased for her safety and each alleged the death of deceased as the result of appellant's negligence.

It is contended by appellant that the court erred in not instructing the jury to find the defendant not guilty. Deceased was a child seven years, eight months and twenty days old at the time of her death and resided with her parents at the south west corner of the intersection of Enos Avenue, which runs east and west, and Sixth Street, which runs north and south in the City of Springfield, Illinois. Deceased daily went to school crossing Enos Avenue at the Sixth Street intersection, and had been warned by her parents about crossing the street. At noon on the sixth day of September, 1922, she went to a store about a block East from her house on the north side of Enos Avenue; she was

accompanied by a sister ten years of age. They got cookies and bread. They crossed Enos Avenue at Seventh Street and came west to Sixth Street and stood south of the sidewalk and across from their home

on Sixth Street. Automobiles were traveling in both directions and the little girl ran diagonally across the street and was struck by appellant's automobile which was being driven south west of the center of Sixth Street. The contention of the defense is that deceased ran out suddenly from behind an automobile going north and without looking in the direction she was going ran directly in front of appellant's automobile so suddenly and unexpectedly that appellant was unable to stop his car or avoid injuring her. There is some evidence to sustain this theory. On the other hand appellee introduced evidence tending to show that deceased did not run suddenly from behind a car but that while deceased stood on the corner and while crossing the street appellant's view of the child was unobstructed. Appellee introduced evidence that the automobile was going at a rate of speed greater than fifteen miles per hour while appellant's witnesses testified that the speed was less than fifteen miles per hour. Appellee introduced evidence tending to show that no warning was given by appellant of his approach while appellant's witnesses testified that appellant sounded the horn of his automobile as he approached the street intersection in question. These questions were typical questions for the jury and were sufficient to warrant the submission of the question of appellant's negligence to the jury if appellee's case was other wise made out.

Appellant contends that the evidence conclusively shows that deceased was guilty of contributory negligence. Betty McGowan who was with deceased testified, "When we got to Sixth Street we looked both ways and we saw two cars coming from the south, and we never saw any coming from the north and, then she ran across and I was waiting for the two cars coming from the south. When she

ran across, a car coming from the north hit her."

This evidence was sufficient to require the submission to the jury of the question of fact as to whether or not deceased exercised that degree of care which a child of her age, intelligence, capacity, discretion, ex-

perience and understanding would naturally and ordinarily use in the same situation and under the same circumstances.

In Morrison v. Flowers, 308 Ill. 189, it was said.

"In weighing the evidence we must take into consideration the age of appellee and his capacity to appreciate danger. In the absence of proof to the contrary he will be expected to exercise that discretion and intelligence in protecting himself that would be expected of an average child of his age under like circumstances. (McGuire v. Guthmann Transfer Co. 234 Ill. 125; Star Brewery Co. v. Hauck, 222 id. 348; City of Chicago v. Keefe, 114 id. 222.) So far as this record shows, appellee had the right to run into the street at any point he chose. The law requires him to exercise due care for his own safety, and he is expected to enter the street with greater caution where persons are not ordinarily expected to enter than at intersections. On the other hand a person operating a motor vehicle along the streets of a city is bound to recognize the fact that children will be found playing in the street and that they may sometimes attempt to cross the street unmindful of its dangers, and the driver owes the children the duty of reasonable and ordinary care under the circumstances. Appellee had a right to assume that motor vehicles using the roadway of this bridge would be driven at a lawful rate of speed. * * * * * When a motor vehicle is proceeding along at a lawful speed and is obeying all the requirements of the law of the road and all the regulations for operation of such machine, the driver is not, as a general proposition, liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid the injury; but if one is running his automobile at a speed in excess of the statutory limit or at an unreasonable

or dangerous speed, he cannot escape liability because the child who is injured ran in front of the automobile so suddenly that the accident was then unavoidable."

The court did not err in submitting the case to the

jury and under the evidence in the case we would not be justified in disturbing their findings.

The court instructed the jury "that if you believe that the plaintiff has proven his case by a preponderance of the evidence as stated in his declaration, the jury will find for the plaintiff." This instruction and others of similar character have been so frequently condemned that had not the court at appellant's request given the exact counterpart of this instruction, we would be inclined to hold its giving reversible error. Appellant therefore cannot complain of this error. Lerette v. Director General, 306 Ill. 348.

Other errors are assigned but we find no reversible error and the judgment is therefore affirmed.

General No. 7600 Agenda No. 38

April Term A. D. 1923

Joe Jacobi, et al, Appellants

vs.

Ben Meyer, Etc., Appellee

Appeal from Sangamon

HEARD, P. J.

Appellants brought suit in the Circuit Court of Sangamon County to recover the purchase price of 350 cases of Blue Ribbon syrup and 50 cases of Iowa Syrup.

Appellee plead payment and upon the trial the court instructed the jury to find the issues for the defendant which instruction being obeyed, the court rendered judgment on the verdict in bar of the action and for costs, from which judgment appellants have appealed to this court.

There is no dispute in the evidence as to the facts in the case. The appellants, who have their office at Des Moines, Iowa, doing business as Besto Syrup Company, sold and delivered to the appellee, who does business at Springfield, certain merchandise, pursuant to a written order taken by their salesman, one Levey, on May 6, 1921. On May 10, 1921, the goods were shipped to the buyer. On July 6, 1921, appellee gave a check to Levey, the travelling salesman who took the order, at Springfield, Illinois, payable to the Besto Syrup Company for $2,352.00, in payment of the account. He went to the bank upon which the check was drawn with said Levey, identified him as the proper person to whom to pay the said check and Levey got the money on the check from the bank, and with the knowledge of appellee wrote to appellants that he had that day collected said sum of

money and that same should be charged to his personal account. Appellee also wrote a letter on the same date to appellants advising them that he had paid Levey the amount of the account. Immediately upon receipt of this communication Appellants called up appellee to advise him that Levey was no longer in their

employ and had no right to collect the account.

The only question in the case is whether or not the giving of the check to Levey by appellee constituted a payment to appellants and operated as a discharge of the conceded indebtedness of appellee to appellants.

The defense of payment is an affirmative defense and where one seeks to defend on the ground of payment to an agent, the burden rests upon him to prove that the person to whom payment was made, was an agent of the plaintiff with authority from the plaintiff, either express or implied, to receive such payment. No such express authority is shown by the evidence. Neither was there evidence of former payments made to the agent and accepted by the principal. This case was tried by appellee on the theory that the agency of Levey established by the correspondence in evidence, was a general agency whereby he had authority to do any act in furtherance of his employer's business, among these acts being the collection of past due accounts.

It is undoubtedly true that if the principal places his agent in a position where the generality of mankind is led to believe that his powers are adequate for the performance of a particular act, the principal is precluded from repudiating the act of the agent done within the scope of the powers his principal has given reason for belief that he possesses.

Faber-Busser Co. vs. Dee, Co. 291 Ill. 240.

We have examined the evidence carefully and aside from the statements of Levey himself, we find it falls far short of being sufficient to warrant us in holding as a matter of law that Levey was a general agent of appellants, or had implied authority from them to receive the payment in question. On the contrary the order on its face shows that Levey was a salesman with limited powers, as it expressly stipulated that the order was "subject to confirmation. This contract is not subject to countermand and any agreement not stated upon this contract will not be recognized. No contract, or verbal promises different from that written or printed hereon will be recognized by the Besto Syrup Company. It is hereby agreed between the parties that this order shall

be payable when due at the office of the Besto Syrup Company, Des Moines, Iowa."

In Merchants National Bank v. Nichols & Company, 223 Ill. 41 it was said:—

"It is to be remembered that persons dealing with an assumed agent are bound, at their peril, to ascertain not only the fact of the agency, but the extent of the agent's authority. They are put upon their guard by the very fact that they are dealing with an agent, and must, at their peril, see to it that the act done by him is within his power. It is their right and duty to ascertain the extent of his power and to determine whether his act comes within the power and is such as to bind his principal. (Mechem on Agency, sec. 276; Reynolds v. Ferree, 86 Ill. 570; 1 Am. & Eng. Ency. of Law 2d ed—— 987). An agent cannot confer power upon himself, and therefore his agency or authority cannot be established by showing either what he said or did. (Proctor v. Tows 115 Ill. 138; Mullanphy Savings Bank v. Schott, 135 id. 655). The source of authority is the principal,

and the power of the agent can only be proved by tracing it to that source in some word or act of the alleged principal."

The evidence failing to show an express authority from appellants to Levey to receive the payment in question and also failing to show a state of facts, from which the law would imply such authority, we must hold that payment to Levey was not a payment to appellants and that therefore the court erred in instructing the jury to find the issues for the defendant.

The judgment is reversed and the cause remanded.

General No. 7608. Agenda No. 67.

April Term A. D. 1923

Welby Miller, Appellee,

vs.

The Joliet Manufacturing Company, Appellant.

Appeal from County Court of DeWitt.

HEARD, P. J.

September 27, 1921. at 8:20 A. M. there was delivered to the Sheriff of the County of DeWitt, an execution and fee bill issued out of the Circuit Court of McLean County, Illinois, dated the 26th day of September, A. D. 1921, in favor of the Joliet Manufacturing Company, a corporation and against Bert Miller, which was levied upon the following personal property:—One Garden Self Deefer attached to a Reeves Separator, One Reeves Separator, complete with self measure belts, etc., One Reeves Traction engine, One Tank with truck, pump and hose One Drive Belt, as the property of the said Bert Miller.

October 24,1921, Appellee filed with the Sheriff his claim in writing for the property in question, and thereafter in accordance with the Statute a trial of the right of property was had in the County Court before the Court, a jury having been waived. The Court found the right of property to be in appellee and entered judgment accordingly, from which judgment this appeal has been taken.

Appellee claimed to have purchased the property from his brother, Bert Miller, about September 1, 1921, although he did not receive a bill of sale for the same, until about the twenty-seventh or twenth-eighth of September, after the judgment, in favor or appellant against Bert Miller

and the receipt of the execution by the Sheriff. While both Appellee and Bert Miller testified to the fact of the sale, their testimony as to the time of payment and manner of payment is not clear.

At the time of the alleged purchase the property was in a shed on the farm of appellee's father, which farm was occupied by Bert Miller. Appellee's residence was with his father in Farmer City. After the alleged

sale and until the levy of the execution the property remained in the same place. Appellee testified "actual possession was not delivered to me. It was left on the same farm on the same place."

Ed Warren, a witness for Appellee, was asked this question:

"Q. From your dealings with reference to the threshing outfit and your observation and your judgment, now who was the owner of this outfit?"

Over objection of appellant he was allowed to answer.

"A. Why, I judged Welby owned it, by him making the contract."

He was also asked:

"Q. Have you learned from any one who was the owner of this property?"

Appellant's objection was overruled and he answered.

A. "Bert Miller told me he sold it to Welby, and Welby told me he bought it."

R. W. McNaughton was asked by appellee's attorney.

Q. "Who was in possession of this threshing outfit at the time you made this contract if you know?"

And over appellant's objection he was permitted to answer:

A. "Welby Miller. He keeps this property on his father's Frank Miller's farm."

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Cary Andrew's was asked, "From your observation Welby Miller has been in possession and owned the property", and answered over objection, "Yes." Over Appellant's objection, C. C. Murdock was allowed to testify to a conversation with appellee, in which appellee said he owned the engine. Frank Miller, a witness for appellee was allowed to testify over appellant's objection, "Welby has been in possession of the threshing outfit since September, 1921;" "That Bert Miller has not exercised any acts of ownership or used this machinery since September 1st, 1921," and when asked "Who if any one, have you seen exercising acts of ownership and possession of this property," over objection answered,

"Welby Miller, so far as I know." Bert Miller over appellant's objection in reply to the question "Who has been in possession of this property since the first of September, 1921," answered, "Welby Miller." Welby Miller over objection was allowed to testify that he was the owner of the machinery September 1, 1921, and that he had been the owner since that time.

Other witnesses testified to self serving statements and acts of appellee after the levy of the execution. Other witnesses were allowed to testify that appellee was in possession of the property and exercised acts of ownership over it without stating any evidentiary facts from which they drew their conclusions.

This evidence was not admitted subject to objection but the objections were overruled and the evidence held competent. This incompetent evidence must have been considered by the court and his finding based thereon, as it was admitted by appellee that there had been no actual change of possession after his alleged purchase prior to the levy of the execution,

and there is no competent testimony as to evidentiary facts tending to show that appellee had constructive possession prior to the levy of the execution. The competent evidence therefore failed to show that appellee was entitled to the property as against the execution creditor. Friedman v. Lesher, 198 Ill. 21; Huschle v. Morris 131 Ill. 587.

The judgment of the County Court is reversed and the cause remanded.

General No. 7613 Agenda No. 46

April Term A. D. 1923

William E. Reiber, Appellee

vs.

John H. Leinweber, Appellant

Appeal from Pike.

HEARD, P. J.

This is an appeal from a judgment for $350.54 and costs in favor of appellee in a suit in assumpsit brought by appellee against appellant.

In the summer of 1920 appellant who was the owner of two farms in Pike County, made a tentative arrangement to rent one of these farms to appellee and the other to Appellee's brother, Alfred, and to sell them stock and farming utensils which were then upon the farm. The arrangement was consumated in the fall and a lease entered into to commence March 1, 1921. Appellee, however, taking possession of the property at once.

This suit is largely a suit brought to recover for services alleged to have been rendered by appellee to appellant and for materials and merchandise furnished prior to a settlement had between the parties May 12, 1921, at which time appellee gave to appellant a note for $551.00 and also prior to a suit brought and judgment recovered before a Justice of the Peace by appellant against appellee upon a settlement claimed by appellant to have been made September 27, 1921.

Appellant's contention, as stated in his arguments is two-fold: "first, that appellee's account is an afterthought and he seeks to recover for services which he did not intend to charge for at the time they were rendered; and second, if the account was honest, it was barred by reason of these settlements."

Appellee's claim was evidenced by a book account which appellee claims was kept by his wife, in which the items and the date thereof severally appear. Appellants claims that it is evident from an inspection of this book that the entries in the account book were all made at one time and it has been certified to this court for our

inspection. We have examined it carefully but as the case must be reversed upon other grounds, do not deem it proper to express an opinion as to this contention at this time.

There was evidently much bitter feeling between the parties, there were many items claimed in the bill of particulars and the evidence in the case very contradictory. It was therefore important that the jury should be accurately instructed.

At the request of appellee the court gave to the jury the following instructions.

"You are instructed that it is claimed by the plaintiff Reiber that the defendant Leinweber is indebted to him in the various items set forth in the bill of particulars. You are further instructed that it devolves upon the plaintiff to prove by a preponderance of the evidence that the defendant is so indebted to him, and you are further instructed that as to such items so proven your verdict should be for the plaintiff."

There was no question in the evidence but what a large portion of the items of services set forth in the bill of particulars had been performed, but there was evidence in the case fairly tending to show that at the time of the rendition of the services neither party expected that they should be paid for other than in kind; that they were all occupying the same farm performing essential services, each for the other, without intention of remuneration. There was also evidence fairly tending to show that after the date of the items in the bill of particulars and prior to the bringing of this suit, appellee and appellant on September 27, 1921, got together in the presence of a witness, went over their mutual claims and as a result thereof found a balance due Appellant of $289.80 which appellee agreed to pay.

The instruction in question directed a verdict and as it entirely ignored these matters of defense, its giving was a reversible error. Some other instruction given an subject to a like criticism.

The judgment is reversed and the cause remanded.

3565

General No. 7617. Agenda No. 61.

April Term A. D. 1923

Peter Bardon, Administrator of the Estate of Alfred Bardon, Deceased, Appellee,

vs.

The Excelsior Stove & Manufacturing Company, Appellant.

2321.A.637

HEARD, P. J.

Appeal from Adams.

This is an appeal from a judgment for $4000.00, recovered by appellee against appellant for damages resulting from the death of Alfred Bardon, deceased.

The accident in which Alfred Bardon was drowned, was the same on which the suit of Peter Bardon, Administrator of the estate of Norma Bardon, deceased vs. The Excelsior Stove & Manufacturing Company No. 7578 was founded, and to the opinion in which case reference is made for a full statement of the pleadings and the circumstance attending the accident.

There is no question in the case but what Alfred Bardon was drowned as the result of the boat in which he with other members of his family were riding.

In the former case no evidence was introduced in behalf of appellant, while in the present case appellant introduced evidence tending to show that Peter Bardon was on the river bank every day during the driving of the piling and thereafter until the time of the accident. He also admitted on cross examination that he had seen the water of the river over all the piling. Evidence was also introduced in this case tending to show that a model boat, such as the one in which the deceased was riding at the time of the accident was not safe for

the carriage of so many persons. While the additional evidence tended to make a stronger case for appellant on the question of contributory negligence on the part of Peter Bardon, yet the question of whether or not he was guilty of such negligence still remained a question of fact for the jury and they having found adversely to appellant on this question, we would not be justified in

disturbing their finding.

Appellee introduced in this case the testimony of Clarence Miller and appellant the testimony of John J. Fisher, President of appellant, as to the arrangement under which the piling were driven in the river, but this testimony in no way changed the fact that the contractor did not have exclusive possession of the premises and that the submerged piling was a public nuisance which had existed on appellant's premises for such a length of time that the jury might rightfully find that appellant had accepted the piling and had knowledge of their dangerous situation.

Other questions are raised as to the introduction of evidence and the court's ruling on instructions. The questions as to the admission of evidence is the same as in the former case. There were 47 instructions given to the jury, 31 of them on behalf of appellant. * The jury were fully and fairly instructed and appellant has no cause for complaint in this respect.

The judgment of the Circuit Court is affirmed.

General No. 7562. Agenda No. 9.

April Term A. D. 1923

George W. Jackson, Appellee.

vs.

J. J. McCarty, Executor of the Estate of John Condon, Deceased, Appellant.

Appeal from Edgar.

NIEHAUS, J.

In June 1919 John Condon now deceased, residing near Hume, Edgar county, a farmer and landowner, sold 160 acres of land to Alexander Hance, also a farmer and landowner, who resided about seven miles west of Hume. In September 1921, Condon was adjudged incompetent to attend to his business, and affairs; and a conservator was appointed to take charge of his estate. George W. Jackson the appellee, who is a real estate agent or broker, filed a claim against the Condon estate in the county court of Edgar county, to recover a commission as broker. A hearing was had upon the claim before the court without a jury at the March term 1921. A finding was entered by the county court disallowing the claim; thereupon Jackson appealed to the circuit court. Before the trial in the circuit court Condon died, leaving a last will and testament which was probated, and under it James P. McCarty who had been acting as conservator of the deceased, was appointed executor; and as such has acted in defense of the appellee's claim. Thereafter a trial was had on the merits of the appellee's claim, which resulted in a verdict and judgment in the sum of $930.00, the claim being for two percent commission for appellee's alleged service as a broker in the sale of the 160 acres of land by Condon to Hance. This appeal is prosecuted to reverse the judgment.

The appellant contends, that there is no evidence to show, that the appellee acted as agent for Condon in the sale of the land, and that therefore he is not entitled to recover any commission for his services. It is true, there is no direct evidence of any contract of agency; or any direct evidence

showing that Condon em

employed the appellee as his agent to sell the land in question; but it is not necessary that agency should be show by direct evidence. Beckstrom v. Armstrong P. & V. Works 220 Ill. App. 598. It is sufficient f the transaction and the circumstances connected therewith justify the inference that the appellee was employed by Condon to act as agent or broker in the sale mentioned. The evidence shows, that he did negotiate and arrange the sale between the parties; and there is evidence from which the jury were warranted in drawing the inference, that he did so, at the instance and request of Condon; also, that Condon recognized his obligation to pay him for the services which he rendered as broker. Alexander Hance the purchaser of the land in question testified to the final negotiations which resulted in the sale to him of the land, and that these were carried on between him and Condon by the appellee; that he made his final offer to Condon through appellee to pay $300.00 an acre, and that the appellee informed him, that the $300.00 per acre offer was accepted by Condon, and thereupon the appellee took him to Condon's home in his car; and then they all went to Hume, where the sale of the land was consummated at the Hume State Bank, and a contract was drawn there. It also appears in evidence, that while the parties were in the bank, the cashier in response to request to draw the contract said, in the presence of Condon, "Mr. Jackson, you are the one that is making this deal, why not you draw this contract;" and that Mr. Condon made no contradiction of the assertion made by the cashier, that the appellee was making the deal. Thomas Bryant another witness testified, that he was working for Mr. Dill on Condon's place in 1919; and that while at work there in the middle of June, he heard a conversation between the appellee and Condon, and heard Condon say to the appellee, to sell if for $310.00. George Dill another witness, who was Condon's tenant, and had lived on the Condon farm in 1919, testified, that he saw the appellee out at Condon's farm in June 1919; and that he heard Condon say, that Jackson had sold the farm that Dill lived on; that Jackson had sold the

place, and that I would have to look for something else. C. L. Swigert, also a witness testified, that he and the appellee drove out to the Condon farm together; and Condon was in the yard sitting under a tree; that Condon got up and walked out to the car in which they were sitting; and that he and Jackson talked a few minutes, whereupon Condon said, he was sorry to have caused the appellee so much trouble in regard to the farm; and also used this language: "I should have been up and settled with you, but I havent done it. I will be up in a few days." He also asked Jackson how much it was, and Jackson pulled out a little book out of his pocket and told him it was $960.00. Whereupon Condon said, "I will be up and settle with you in a few days."

We are of opinion that from the evidence, the jury were fully warranted in arriving at the conclusion, that the appellee acted as Condon's agent in bringing about a sale of his land, and that therefore he was entitled to recover a commission therefor.

The evidence also shows, that two percent is the usual and customary commission paid to real estate brokers for services such as were rendered by the appellee in making the sale. A real estate broker employed to make sale of land, who finds a purchaser at the price fixed by the owner is entitled to recover the usual and customary reasonable compensation for the service performed, in the absence of proof showing that the amount of compensation was agreed upon. Purgett v. Weinrank 219 Ill. App. 28. The verdict and judgment are in accordance with the evidence and the law, and the judgment is therefore affirmed.

Affirmed.

General No. 7569. Agenda No. 15.

April Term A. D. 1923

E. S. Spindel, Appellee,

vs.

Elizabeth Aldich, Appellant.

Appeal from County Court Sangamon County.

NIEHAUS, J.

This is an appeal from a judgment for $150.00 rendered in the county court of Sangamon county against the appellant Elizabeth Aldrich, and in favor of the appellee Enos S. Spindel, a physician, for performing a surgical operation on the minor son of the appellant, Emmet Aldrich. At the close of all the evidence on the trial, the court directed a verdict for the full amount of his claim; and this is assigned as error. An examination of the record discloses, that the evidence presents a contested question concerning the number of professional visits which the appellee made, and for which a charge of $2.00 per visit was made. There is also a controverted question in the evidence, which was raised as a matter of defense to appellee's claim, namely, that the surgical operation which was performed by appellee upon appellant's son, and which consisted of an amputation of one of his feet, had not been performed in a timely and proper manner; and in accordance with the recognized and accepted principles and practices generally observed by the medical profession in an operation of that kind. There is some evidence in the record tending to show that the amputation was not so performed. There is also some evidence tending to show that the professional visits of the doctor were not as many as claimed. The controverted questions referred to, should have been submitted to the jury for their consideration, and it was error for the court to determine them for the jury, by directing a verdict. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

General No. 7573. Agenda No. 18.

April Term A. D. 1923

Marion O. Flanigon, Administrator, etc., Appellee.

vs.

John D. Gibson, et al, Defendants,

Clara E. Gibson, Clara E. Gibson, Executrix, etc., Appellant.

Appeal from McLean.

NIEHAUS, J.

In this case the appellee Marion O. Flanigon, who is administrator with will annexed of the Estate of Marion F. Gibson deceased, filed a bill to construe the last will and testament of the deceased in the circuit court of McLean county. The testator died May 27, 1920 and left his widow surviving; and the widow died Sept. 14, 1921, leaving her surviving, the original seven children of the testator, except Harry C. Gibson, who had died Sept. 30, 1920. After the death of the widow, on December 15, 1921, Frank Gibson, also one of the seven children referred to in the will, died, leaving his widow, Clara E. Gibson, appellant, surviving him, but no heirs of the body. The provisions of the last will and testament involved in this controversv, are as follows: "First: I direct that all my just debts, including my funeral and burial expenses, be fully paid as soon as conveniently may be done after my decease.

Second. I give, devise and bequeath to my beloved wife, Mary J. Gibson, for and during the term of her natural life only, all real and personal property which I may own or be entitled to at the time of my decease, whether owned by me now or acquired by me hereafter, wheresoever situated, and including our household goods, and any moneys, notes, bonds, or other securities which I may own at the time of my decease.

Third. Subject to the life estate given by the second clause of this will, to my beloved wife, Mary J. Gibson, I hereby give, devise and bequeath to my son John D. Gibson my homestead

property in the village of Bellflower, McLean county, Illinois, consisting of a residence and outbuildings, and about three acres of land.

I make this provision for my said son John D. Gibson by virtue of an agreement entered into with him several years ago under the terms of which it was agreed that he should live with myself and my wife so long as we should both live, and that he should take care of us, and my said son having fulfilled his contract up to this time and fully relying upon his carrying out the remainder of his agreement, I have made the above provision for him. It being my part of the agreement that in consideration of his living with myself and my wife so long as we both should live, and care for us, that in such event I would give him my homestead property above described.

Fourth. I am now the owner of two hundred and sixty (260) acres of farm land, more or less, in sections seventeen (17) and twenty (20), Town of Bellflower, McLean county, Illinois, which I believe are correctly described as follows: The northwest quarter (1-4) of Section Twenty (20); The Northwest quarter (1-4) of the northeast Quarter (1-4) of Section Twenty (20); the west half (1-2) of the northeast quarter (1-4) of the northeast quarter of Section Twenty (20); and the southwest quarter (1-4) of the southeast quarter (1-4) of Section Seventeen (17); All in Township Twenty-two (22) North, Range Six (6) East of the Third Principal Meridian in McLean County, Illinois.

And it is my wish and will that all of said real estate last described, or any other real estate which I may own at the time of my decease, save and except my homestead property mentioned in the second and third clauses inbefore devised in the second and third clauses of this will, be sold and converted into money within one year next after the first day of March following my decease, if my wife Mary J. Gibson shall then be dead, and if not, then within one year next after the first day of March following the decease of my wife Mary J. Gibson, if she survives me.

It is also my wish that all the personal and chattel property be likewise converted into cash within the same time above limited. And to this and I hereby authorize, direct and empower the administrator with will annexed of this will to make sale of all the real estate of which I may die seized and possessed, or be entitled to at the

time of my decease, save and excepting only my homestead property mentioned in th second and third clauses of this will.

I further direct that said sale and settlement therefor shall be made within the time above limited in this clause of my will, and that said sale shall be at either private or public sale as may be deemed best by the administrator with will annexed of this will, but an effort should be made to sell said lands for the highest price obtainable within said time, but the method of this shall be in the discretion of said administrator with will annexed.

I further authorize said administrator with will annexed, in connection with said sale, to procure and furnish to the purchaser or purchasers of said real estate complete abstracts of title certified down to approximately the time of closing said sale, showing good merchantable title clear of encumbrance, and I further authorize him to advertise said sale or sales as he may deem best, and if he deem it necessary, to employ a competent auctioneer to make said public sale of said real estate, or to employ an agent or agents to make a private sale of said real estate, as in his judgment may be deemed best.

I further authorize him to enter into such contract or contracts for the sale of said real estate as he may deem best for the interests of my estate, such contracts, however, to be in the usual form of such contracts generally used in the community at the time the land is sold.

I further authorize him to pay all taxes which may be legally levied against any of said real estate, and to keep the buildings thereon insured for their fair insurable value; to rent said land for a period of not exceeding the time of

closing the sale as hereinabove limited, such lease to be on the usual and customary terms of rental in the vicinity where said lease is made, and to collect the rents therefrom.

I likewise authorize and direct said administrator with will annexed to convert all my chattel property, notes, bonds, or other evidences of indebtedness into

money within the time above limited.

Said administrator with will annexed shall have full power and authority to make said sales of real estate and personal property without any order of court for that purpose.

In order that said administrator with will annexed shall have full power and authority to carry into effect any sales made by him hereunder, I hereby fully authorize and empower, and direct said administrator with will annexed to execute, acknowledge and deliver to any purchasers of any of my said real estate, as hereinbefore provided, good and sufficient deed or deeds with covenants of general warranty, and sufficient to pass to such purchaser or purchasers the fee simple title in said real estate so purchased by them hereunder.

I also authorize said administrator with will annexed, if he deems necessary, to make and deliver to any purchaser of personal property such bill of sale or assignment thereof as he may deem necessary or expedient to pass the title in said property to the purchaser.

Fifth. I have heretofore made advancements from my estate to some of my children, and in all such cases I have taken their receipt for the money so advanced to them, said receipts stating that such sums advanced to them shall bear interest at four per cent per annum from the date of such advancements to the date the same is paid, and it is my will that any such advancements shall be brought into hotch potch and be treated as part of my estate in the distribution herein provided for.

Within one year next after the first day of March following the decease of my wife Mary J. Gibson, if she survives

me, and if not, then within one year next after the first day of March following my decease, the administrator with will annexed herein shall, as hereinbefore provided, then have in his hands all of my estate in money, and all of my real estate save and except my homestead property hereinabove described and devised, as well as all my chattel property, notes, and other evidences of indebtedness, having been reduced to money at such time, and having said funds in his hands at the

time last hereinabove fixed, I direct and will that said administrator with will annexed pay out and distribute the same as follows:

1. He shall pay to my two grand daughters, Grace Gibson and Blanche Valverde, children of my deceased son Joseph Wallace Gibson, each the sum of one thousand dollars ($1000). Provided, however, that if either of said two named grand children of mine shall be dead at the time of such distribution, the legacy to such deceased grand child shall lapse and is hereby revoked Payment of said legacies to my grand children to be made only in case they are living at the time of sucn distribution. But the death of one of said grand children prior to said distribution shall not cause the legacy to the other grand child to lapse if the other grand child is then living.

2. If my seven children hereinbefore named, viz. John D. Gibson, Frank Gibson, Archibald Tilden Gibson, Harry C. Gibson, Elizabeth Scarborough, Daisy Miller, and Nora May West, are living at the time of said distribution, then it is my wish and will that the whole of my estate not hereinbefore devised or bequeathed, shall be paid out in seven equal parts, each of my said seven children last named to have an undivided one seventh (1-7) thereof.

However, if my son Harry C. Gibson shall die prior to the time fixed for said distribution, then it is my will that there shall be paid to Lester G. Gibson, son of said Harry C. Gibson, if he is then living, the sum of one thousand ($1000) Dollars, and there shall be likewise cancelled and surrendered

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to said Lester G. Gibson any receipt or other instrument showing any advancements by me to Harry C. Gibson father of said Lester G. Gibson, and the said Lester G. Gibson shall take nothing further from my estate, and the balance of the share or interest in my estate which would have been paid to the said Harry C. Gibson hereunder, had he been living at the time of such distribution, shall be paid out and distributed equally, share and share alike, to such above named seven children of mine as shall be living at the

time of said distribution.

3. If my said son John D. Gibson should die prior to the time fixed for the distribution of my estate, as hereinbefore provided, then the share or interest in my estate which would otherwise have been paid to my said son John D. Gibson under the terms of this will, shall be paid out and distributed to such of my said seven children above named as may be living at the time of the distribution hereinabove fixed, equally share and share alike.

4. In the event any of the following named five children of mine, viz, Frank Gibson, Archibald Tilden Gibson, Elizabeth Scarborough, Daisy Miller and Nora May West should die prior to the time of the distribution herein fixed, then it is my will that the heirs of the body of said deceased child so dying prior to the said distribution, shall take the share or interest in my estate which their parent would have taken hereunder had he or she survived, per stirpes and not per capita.

Sixth: If any of my children or grand children hereinabove named shall make or file against my estate any claim for services rendered for me, then it is my will, that any provision hereinbefore made for such child or grandchild of mine, shall be, and the same is hereby revoked, and such child or grand child of mine hereinabove named who files any such claim against my estate shall be paid the sum of five dollars ($5.00) in full of their share and interest in my estate, and shall take nothing further in my estate.

Seventh. All the rest, residue and remainder of my estate,

whether real, personal or mixed, not herein otherwise disposed of, I hereby give, devise and bequeath equally, share and share alike, to my seven children hereinabove named, viz: John D. Gibson, Frank Gibson, Archibald Tildon Gibson, Elizabeth Scarborough, Harry C. Gibson, Daisy Miller and Nora May West.

Eight: I have not by this will named any executor thereof, as I have felt that it would be best for the person representing my estate to be chosen by my children. It is therefore my will that as soon as possible after my

decease that such of my children as may be living at the time of my decease shall select some person to act as administrator with will annexed of this will, and the request for the appointment of such administrator with will annexed signed by a majority of my children living at the time of my decease shall be sufficient to authorize a court of competent jurisdiction to appoint such person as administrator with will annexed of this will. But in the event a majority of my children living at the time of my decease cannot agree upon the selection of any person to act as administrator with will annexed, of this will within sixty (60) days after my decease, then it is my will that such court as may have jurisdiction to admit this will to probate shall, of its own motion, name some reliable and responsible person living in the village of Bellflower, Illinois, or in that vicinity, as administrator with will annexed of this will.

In the event any such administration with will annexed should die prior to the carrying out of the terms of this will, then it is my will that any such person who may be issued letters of administration de bonis non with will annexed, otherwise, shall have all the powers and authority herein conferred upon the administrator with will annexed of this will.

Ninth: I have made this will only after full and careful consideration, although the provisions herein may not be entirely satisfactory to my children, nevertheless, I have made such provisions herein for them and for their children in case of

their decease, as seemed wise and best to me.

In the event that any child or grand child of mine should file or cause to be filed any bill to contest or set aside this will, or should resist the probate thereof, then it is my will that such child or grand child of mine shall take nothing, whatever under the terms of this will, and such share or portion of my estate as would otherwise be received by and paid to said child or grand child of mine, shall in such case, be paid out and distributed to such of my seven children hereinabove named as may be living at the time of the distribution hereinabove

provided for who may not have filed or joined in the filing of any bill to contest or set aside this will, or attempt to resist the probate of this will."

The chancellor heard the case and rendered a decree construing the will; and the findings in the decree pertaining to the controverted matters, are as follows:

"That Frank Gibson, son of said testator died testate and that his widow, defendant Clara E. Gibson, has been appointd by the County court of said McLean County as executrix of the Last Will of said Frank Gibson and is now acting in that capacity, and that said Clara E. Gibson duly filed her written renunciation of the provisions in her favor in the will of Frank Gibson, and thereby became entitled to her statutory rights and share in this estate. That Marion Francis Gibson, (the testater) departed this life testate, May 27, 1920, and was at the time of his death the owner of and seized in fee simple and in possession of the real estate described in said bill. That complainant was duly appointed administrator with the will annexed, and duly qualified as such, and is now acting in that capacity. That in and by said last will ample power was given by said testator to the administrator with the will annexed, who should be appointed to carry out such will by the county court of said McLean County, to make sale of the real estate of said testator not specifically devised, and that Complainant in this cause has ample power to sell and convey the real estate directed by said will to be sold. That at the

time of his death, said testator left him surviving the seven children who are named as devisses or legatees in said will, viz: his sons, John D. Gibson; Harry C. Gibson; Frank Gibson, whose full name was Frank M. Gibson; Archibald T. Gibson whose full name is Archibald Tilden Gibson; also his three daughters, viz., Elizabeth Scarborough; Daisy Miller, and Nora M. West, whose full name is Nora Maye West. That May J. Gibson, widow of said testator, departed this life ,September 14, 1921, whereby it becomes the duty of complainant to sell said real estate and convert the entire estate of said testator into money so that same shall be ready to distribute on March 1, 1923. That Harry C. Gibson, son of said testator and

named as legatee in said last will, died after the death of his father, and on, to-wit, December 30, 1920, leaving him surviving an only child, Lester G. Gibson, and his widow, Hannah Gibson; that John D. Gibson, son of said testator, and Grace Gibson and Blanche Valverde, granddaughters and legatees named in said will are each still living and parties to this cause; that Frank Gibson, son of said testator and one of the seven children named as legatees in said will, died testate on December 15, 1921, after the death of said testator, and left him surviving no issue or descendant, but left him surviving, defendant Clara E. Gibson, his widow, who is executrix of his will; that John D. Gibson has an only child, defendant Frank M. Gibson; that Elizabeth Scarborough has two children, Flossie Sullivan and Fern Royce; that Nellie J. Gibson, wife of testator's deceased son, Joseph Wallace Gibson, is still living; that Nora May West has three children, viz., Lawrence West, now of full age; Faye Vandeventer, and Dorothy West; that said Daisy Miller has two children, viz., Archie Miller and Hazel Ehler; that the above named are all and the only children of children of said testator. The Court further finds, that the true intent and meaning of the last will of said testator when properly construed was to provide for the sale and conversion into money by complainant as administrator with the will annexed, of all the estate of testator other than

his homestead, by March 1st next following the death of testator's widow, if she out lived testator, which date is March 1, 1923, and on which date or prior thereto if complainant shall succeed in converting said property into money, and be ready to make distribution before that time for the distribution date and the time fixed for the vesting of legacies under said will, and that all of said legacies not prior thereto becoming vested shall vest on March 1, 1923, even though complainant is for any reason prevented from then making distribution; that the element of futurity was annexed to and made a part of the gist of the legacy of each of the seven children named as legatees in the fourth and fifth paragraphs of the Last Will of said testator, and that the legacy to each of said seven children of testator named therein is contin-

gent on such child surviving until distribution of said estate or distribution date above recited; that testator's son, Harry C. Gibson, having departed this life, that out of the one-seventh share or portion of said estate intended for said Harry C. Gibson, One Thousand ($1,000) Dollars shall be paid to Lester G. Gibson, son of said Harry C. Gibson, if said Lester G. Gibson lives till the time of such distribution or until March 1, 1923; and that the notes above recited given by said Harry C. Gibson, and held by complainant as such administrator, shall also be cancelled and delivered to said Lester G. Gibson. The Court further finds that the remainder of said one-seventh share or portion intended for Harry C. Gibson shall be paid out and distributed equally, share and share alike, to such of the seven children of said testator named in said will as shall be living at the time of said distribution or on March 1, 1923, if distribution is not sooner made. The Court further finds that the testator's son, John D. Gibson is entitled to be paid and to receive his full one-seventh share or portion as provided in said will if said John D. Gibson shall be living at the time of such distribution, or on March 1, 1923, if not sooner distributed, but if said John D. Gibson dies prior to the making of such distribution or prior to March

1, 1923,

if distribution is not made before that date, then and in such event, the said share to which said John D. Gibson would have been entitled if living, shall be paid by complainant to and distributed among such of the seven children of said testator as may be living at the time of such distribution or on March 1st if not sooner distributed. The Court further finds that Grace Gibson and Blanche Valverde, grand-daughters of said testator, and daughters of his deceased son, Joseph Wallace Gibson, are each entitled to the legacy of one Thousand ($1,000) Dollars, provided for in the fifth paragraph or section of said will, if she is living at the time such distribution is made, or on March 1, 1923, if distribution is not sooner made, but such legacy remains contingent in the case of each upon her outliving the time of such actual distribution or such distribution date, March 1, 1923, and

if either of said legatees dies before that time her legacy shall lapse and was revoked by said testator, and in such event the amount thereof shall fall into the residue of said estate and pass under the seventh paragraph of said will; but the death of one of said two legatees last named shall not cause the legacy of the other to lapse. The Court further finds that testator's son, Frank Gibson, husband of defendant Clara E. Gibson, having died after the death of his father and mother and prior to the time fixed for distribution of said estate, and having left no issue or descendant, the legacy intended and provided for him, being one seventh share of the estate as provided in the fourth and fifth paragraphs of said will, and which was contingent upon his surviving distribution, failed to vest and became intestate property. That same did not pass under the residuary clause of said will because of the fact that the residuary legatees named therein are the same persons as the legatees named in the paragraphs of the will providing for such share. That said one seventh share of the proceeds of said testator's estate intended and provided by the fourth and fifth paragraphs of said will for testator's son, Frank Gibson, if said son sur-

vived the distribution or distribution date, shall therefore pass as intestate property to those who were heirs of said testator at the date of testator's death. And that said one seventh share should now be paid by complainant share and share alike in eight parts or shares; one of such parts or shares to each of the children of said testator if living at the time of distribution, otherwise to the personal representatives of such child; one of such shares or one eighth part of said legacy to Grace Gibson and Blanche Valverde, children of Josepn Wallace Gibson, share and share alike, equally, and in the event of death of either before receiving same, then her share of same shall be payable to her personal representative; one part or share of said legacy, being the one eighth part of such one seventh share, is properly payable by complainant to defendant Clara E. Gibson, to be received by her as Executrix of the Last Will of her de-

ceased husband, Frank Gibson, and accounted for by her in due settlement of the estate of Frank Gibson, one of said one eighth parts or shares of said legacy is payable by complainant as such administrator to the personal representative of Harry C. Gibson, deceased. The Court further finds that each of the five children of said testator who is still living, is entitled to the legacy of one seventh of the proceeds of said estate provided for in said will, provided such child remains alive at the time of distribution thereof, or on March 1, 1923 if distribution is not sooner made. If any one of said five children now living other than John D. Gibson, shall die before such distribution is made, or before March 1, 1923, if not sooner made, his or her share or legacy shall thereupon be payable to the heirs of the body of such child, if any, who are living at such distribution date, or otherwise on March 1, 1923; but if any of the said children other than John D. Gibson shall depart this life and leave no heir of his or her body living at the time of such distribution date, or on March 1, 1923, if not sooner distributed, then the share of legacy of such child shall likewise become intestate and pass in

like manner as the share or legacy of testator's son, Frank M. Gibson, as hereinabove stated. The legacy of said John D. Gibson, in the event of his death prior to such distribution date, to be divided share and share alike among such of the seven children who outlived said testator as may be living at such distribution date or on March 1, 1923."

It is contended by the appellant, acting in her own right, and as executrix of the estate of her deceased husband, Frank Gibson, that the estate disposed of by the will vested at the time of the death of the testator under the residuary clause of the will; that the legal title vested in the widow of the testator for life, and the remainder in his legal heirs; that the period of distribution was postponed merely for the benefit of the life estate, and therefore, that the element of futurity was not attached to the distribution.

It will be noticed however, that by the terms of the will the appellee as administrator with will annexed, is

invested with a trust; he is fully empowered and directed to make sales of the real and personal property at public or private sale without any order of court for that purpose; and to convert into cash all of the property; and to distribute the proceeds of the sales as directed by the will. These provisions were in effect a devise of the real estate to him, subject to the life estate in the widow for the purposes set out in the will. Fenton v. Hall 235 Ill. 552. And the devise in this case amounts to an equitable conversion of the land into money. Buckner v. Carr 302 Ill. 378; Starr v. Willoughby 218 Ill. 485.

The question raised by appellant concerning the vesting of the legacies, and the bequests directed to be paid to the beneficiaries from the proceeds of the sales to be made, can readily be determined from the language employed by the testator in the direction given with reference to the payment of the same. Bequests cannot be considered as vested unless the persons or class of persons to take them, are definitely ascertained. The

language of the testator is clearly to the effect, that the legacies and bequests provided for, should be paid to the beneficiaries in the event that they survived the time of distribution; and were therefore contingent upon that event. People v. Byrd 252 Ill. 223; Brechbeller v. Wilson 228 Ill. 502; Eby v. Adams 135 Ill. 80; Starr v. Willoughby supra; see also Meldahl v. Wallace 270 Ill. 220.

As stated in Buckner v. Carr, supra: "A devise of real estate which by the provisions of the will was to be converted into money and that money distributed among the devisees must be treated as a devise of money and not of land; that the legal title to the land is held in trust for the purposes specified in the will; whether the title is left by the will to descend to the heirs by operation of law, or whether by will it is vested in a trustee; and it makes no difference in this respect, that the legal title descended to the devisees to whom the bequest is to be paid in money when the land is sold."

The main contest in this case, however, concerns the disposition of the share devised by the testator to his son Frank Gibson, who died after the death of the tes-

tator, and the testator's widow, but prior to the time of the distribution. The settled rule of law pertaining to the construction of wills is to the effect, that the intention of the testator, as gathered from the entire will must prevail in carrying out its provisions. Fenton v. Hall supra; Alderman v. Drystrup 293 Ill. 504; Ingraham v. Ingraham 169 Ill. 432; Johnson v. Askey 190 Ill. 58; Alderman v. Drystrup 215 Ill. App. 421. In the will under consideration, the intention of the testator appears to be clearly manifested in the various provisions of the will; and appears to be that those of his children who would survive the time of distribution should be the beneficiaries of his estate, and share equally therein, unless certain conditions arose which are specified in the fifth paragraph of the will; as under the fourth clause of the fifth paragraph where the testator specifies, that in the event any of

the five children mentioned therein (including Frank Gibson) should die, prior to the time fixed for the distribution, and leave heirs of the body, then the share which the parent would have taken should be paid to such heirs of the body per stirpes. This event never happened. Frank Gibson did not die leaving heirs of the body; and having died prior to the time of distribution, his share never vested, but according to the intention of the testator as manifested, should go to the children of the testator surviving at the time of distribution, in equal parts.

The chancellor found in the decree rendered, that the share of Frank Gibson deceased, upon his death, became intestate property, and passed to the persons who were the legal heirs of the testator at the time of his death. He also found, that if any of the five surviving children mentioned in Clause Four of the Fifth paragraph of the will should die without leaving heirs of the body prior to the time fixed for distribution, the share of such child, would become intestate property, as in the case of Frank Gibson deceased, and pass to the persons who were heirs of the testator at the time of his death.

We are of opinion, for the reasons stated, that this construction is erroneous; but that the construction in all other respects, is correct. The decree is therefore affirmed, except the findings indicated, which are reversed, with directions to change the decree in the particulars mentioned, in accordance with the views hereinbefore expressed.

Affirmed in part and reversed in part with directions.

General No. 7581 Agenda No. 24

April Term A. D. 1923

Emma Wooten, et al, Appellants

vs.

William Isaac Armstrong, et al, Appellees

Appeal from Shelby.

NIEHAUS, J.

Lafayette Armstrong deceased made and executed a last will and testament on the 25th day of September 1913. He died in November 1920; and the last will and testament was probated in the circuit court of Shelby county on appeal from the county court. By the terms of the will, the testator made his nephews William Isaac Armstrong and Henry Joel Armstrong sole legatees. After the probate of the will, Emma Wooten and Charles Armstrong, sister and brother of the deceased, and Angie Easter, Katie McCall, Roberta Poston, Walter Poston and Charles Poston who are nieces and nephews of the deceased, filed a bill in equity to contest his will, alleging in the bill, that the testator at the time of the execution of the will was not of sound mind and memory; also that he was under improper restraint: and that the legatees of the will exercised undue influence over him at the time the will was made. Upon the trial of the cause, the court allowed an amendment to the bill, which averred "that the alleged last will and testament was not executed and attested in legal manner and form." "That the persons purporting to have signed the alleged will never signed the same." And "that the probate of the purported will in the county court was illegal, in that same was probated without any authority after the same had been denied probate by said court." Before the case proceeded to trial, issues of fact were made up, and submitted to the jury, namely: First: Was the instrument of writing, offered in evidence and marked Proponents Exhibit No. 1, purporting to be the last will and testament of Lafayette

Armstrong, deceased, the last will and testament of said Lafayette Armstrong, deceased. Second: Was said Lafayette

Armstrong deceased, at the time of the execution of said instrument, alleged to be his will, of sound mind and memory. Third: Was the execution of said instrument alleged to be the will of Lafayette Armstrong deceased procured by undue influence. The trial resulted in a verdict by the jury finding, that the purported will, was the last will and testament of the deceased; that he was of sound mind and memory at the time of its execution; and that the execution of the will was not procured by undue influence. And the court rendered a decree in accordance with the verdict and findings of the jury; this appeal is prosecuted from the decree.

The principal contention made by counsel for appellants concerns questions raised by the amendment to the bill referred to, by which the legality of the probate of the will is attacked. The amendment was irrelevant to the issues which were to be tried. The appellants right to file a bill to contest the will, and the authority of the court to hear and determine the issues thereby presented for adjudication, were based upon the prerequisite and juridictional fact, that the will had been probated. Cahill's Revised Statutes Chapter 148, Section 7. And the probate of the will was a material and necessary allegation in appellants' bill; and this allegation appears in the bill in this language: "The said instrument in writing, purporting to be the last will and testament of said Lafayette Armstrong, was exhibited to the county court of the county of Shelby and State of Illinois, and upon the order of the circuit court of the county of Shelby and State of Illinois, the same was then and there probated, and letters testamentary thereon were granted to the Shelby Loan & Trust Company." Appellants were bound by this averment and cannot legally be permitted to contradict it. In Hutchinson v. Hutchinson, 250 Ill. 170, the court said: "A preliminary question arises upon the action of the court in denying the appel-

lant's motion to dismiss the suit for want of jurisdiction. This motion was based on the claim that the original bill did not aver, that the alleged will had ever been admitted to probate. This

claim is an error, because the bill did aver, that the instrument was exhibited in the probate court for probate, and an order was therein entered granting probate of the same. The subsequent allegations, that the evidence was not heard in open court or by the judge of the court are immaterial. It is the existence of the order admitting the instrument to probate which is material. It is that order which is sought to be set aside. Whether it was properly entered upon the showing made, or was based upon evidence which was competent or incompetent, sufficient or insufficient, or upon any evidence whatever, is not the subject of inquiry in this proceeding." What the court said in the case referred to effectually disposes of all questions raised by appellants concerning the propriety and effect of the amendment; as well as the competency of the evidence offered with reference thereto.

Complaint is also made by the appellants concerning the correctness of several instructions given for the appellees. We find no error in the instructions; it was not error to have given seperate instructions referring to the several issues which were tried, and this could not have had the effect of misleading the jury, but rather would have the effect of aiding them in the consideration and determination of the separate issues presented for their consideration, by directing their attention specifically to the law governing each of them. We are of opinion that the evidence fully warranted the jury in reaching the conclusion which they did concerning the question of the mental capacity of the testator, and the matter of undue influence alleged.

The record does not disclose any reversible error, and the decree is affirmed.

Affirmed.

General No. 7594. Agenda No. 33.

April Term A. D. 1923

A. L. Salmons, Appellant,

vs.

O. L. Langellier, Appellee.

Appeal from Logan.

NIEHAUS, J.

The appellant A. L. Salmons sued the appellee O. L. Langellier in assumpsit, before a justice of the peace in Logan county for two months rent, namely November and December 1920, amouting to the sum of $300.00; (also for $4.00 water tax) which he claimed was due him under the terms of a written lease, under which it is insisted the appellee had occupied a garage building by the appellant in the city of Lincoln, and which the appellee vacated two months before the expiration of the term fixed by the lease. On the trial before the justice the finding and judgment was in favor of the appellee; an appeal was thereupon taken and perfected to the circuit court of Logan county, where a trial de novo also resulted in a verdict finding the issues in favor of the appellee. A judgment was rendered upon the verdict in bar of appellant's suit. From this judgment an appeal is prosecuted.

The only question in this case is one of fact, namely, whether the written lease in question was accepted and delivered by both parties thereto; the question of acceptance and delivery by the appellee was the main controverted question on the trial, and is a contested matter on appeal; This question was submitted to the jury under the instructions. If the testimony of the appellee, and his agent Pettit, who was in charge of appellee's business, may be taken as true, then there was no delivery nor acceptance of the lease, by the appellee, and the appellee never became a tenant under the lease. It is evident, that the jury found that the version of the appellee and his agent was the true one; and that therefore the leasing

contract was never completed. A careful examination of the evidence warrants the conclusion which the jury reached in their finding and verdict. Judgment is therefore affirmed.

General No. 7611. Agenda No. 45.

April Term A. D. 1923

John B. Colegrove, Appellee.

vs.

Mary Ellen Calloway, et al, Appellants.

Appeal from Christian.

NIEHAUS, J.

This is an appeal from the order and decree of the circuit court of Christian county for the allowance of a solicitor's fee of $810.00 to B. C. Neff, solicitor for the complainant in a partition proceeding; the proceeding had resulted in a decree fixing the interests of the parties, and thereafter a finding by the commissioners, appointed to partition, that the premises could not be partitioned without prejudice to the interests of the parties; thereupon there was a sale by the Master, and an order of distribution of the proceeds of the sale, in accordance with the interests of the parties as fixed by the decree.

The bill alleges that John B. Colegrove, the appellee, who is complainant in the bill, had an undivided one sixth interest in the premises sought to be partitioned, as tenant in common; and the decree finds, that the interest of the complainant is subject to a judgment lien amounting to the sum of $6298.82, and costs of suit, in favor of the intervening petitioner David McWard and Mamie Callaway as administrators of the estate of David McWard, Sr., deceased. And the record discloses that the question of the amount of the complainant's interest was a matter of sharp and bitter contest and controversy in this case. In partition proceedings, the allowance of solicitor's fees is limited by statute to cases where the rights and interests of all the parties in interest are properly set forth in the uill. Chap. 106, Par. 40 Cahill's Rev. Sts. Every person having an interest whether in possession or otherwise, should be made a party to the proceeding, and the court

should ascertain and declare the rights, titles and interests of all parties. As the court is required by the sta-

tute to find the right, title and interest of all parties, the bill must set forth such interests, and set them forth properly, to warrant the allowance and apportionment of solicitor's fee. Wachter v. Doerr 210 Ill. 242; Finlen v. Foster 211 Ill. App. 609. In this case the complainant did not properly set out his own interest; and moreover his own interest was the subject of much contention and controversy. Under these circumstances there is no statutory right to allow a solicitor's fee to be apportioned. Nor does the record disclose that the court heard any evidence as to what would be a reasonable usual and customary fee in this case. Bliss v. Seeley 191 Ill. 461; Metheny v. Bohn 164 Ill. 495; Reynolds v. McMillian 63 Ill. 46.

For the reasons stated, the decree is reversed and the cause is remanded, with directions to strike out of the decree the allowance and apportionment of the solicitor's fee and the direction in the decree for the payment of the same.

Reversed and remanded with directions.

General No. 7620. Agenda No. 63.

April Term A. D. 1923

E. F. Motsinger, County Superintendent of Highways, Appellee,

vs.

James H. Chenoweth and Quinton D. Baily, Appellants.

Appeal from Fulton.

NIEHAUS, J.

This is a proceding, under Section 82 of Chapter 121 known as the Road & Bridge Act, to assess damages to James H. Chenoweth, appellant, the owner of one half of the land taken, and his mortgagee, Quinton D. Baily, for property taken and damaged for a public and private road of the width of twenty feet and of the length of eighty rods, more or less, commenced before a police magistrate of the town of Farmers, in the county of Fulton, by appellee, superintendent of highways of that county, acting for the town of Farmers, who filed a certificate with the magistrate, who acted as justice of the peace, to have the damages assessed. The certificate sets up the fact that appellee in his official capacity, acting for the town aforesaid, had granted the prayer of a petition of George T. Wilson that the said road be laid out for private and public use. He asked that a jury be empanaled and damages assessed, after stating that appellant was the owner of the land constituting the west ten feet of the road, that Baily had an interest therein as mortgagee, and that Wilson was the owner of the east ten feet of the road and had stipulated to release all damages for that trip. The certificate also described the road minutely and showed that it was located between the southeast quarter of the northeast quarter and the southwest quarter of the northeast quarter of Section 18, town 5, north, range 1, east of the fourth principal meridian.

Upon the filing of the certificate referred to, the

magistrate issued a summons against the appellant, and the mortgagee Clinton D. Baily, and ordered a venire for a jury. In response to the summons appellant appeared

before the magistrate, and (limiting his appearance for that purpose,) made a motion in writing to dismiss the proceeding because the court was without jurisdiction to hear the matter, because the certificate filed by the county superintendent of highways was insufficient to give the court jurisdiction of this matter; and assigning as special reasons among others, that no proper survey had ever been made of the road proposed to be laid out in the manner required by law; and because no attempt had been made by the county superintendent of highways, acting for the town of Farmers, to agree with the said James H. Chenoweth, and other defendants herein on account of damages occasioned by the laying out of said road as required by law.

The motion to dismiss was denied by the magistrate, and a jury was empanelled, and the damages of appellant and Baily were assessed by the jury at the sum of $400.00; judgment was entered on the verdict. Thereupon appellant appealed to the circuit court, and before a jury was called to try the case, again moved the court to dismiss the suit on the ground that the court was without jurisdiction to empanel a jury to assess the damages because (1) the necessary and requisite preliminary steps had not been taken by the superintendent of highways to confer jurisdiction; (2) because the defendant is competent to contract, and that no attempt had been made by the superintendent to agree with him on the damages to be paid to him; (3) because the superintendent did not prior to the suit before the police magistrate, make a survey of the road proposed to be laid out and established, as required by law; and for other reasons. This motion was denied but was renewed at the close of plaintiff's evidence, and at the close of all the evidence, and denied. The jury returned a verdict in the trial before the circuit court assessing the damages in the sum

of $350.00. An appeal from this judgment was prosecuted to the Supreme Court, and thereupon transferred to this Court. Mostinger v. Chenoweth, 308 Ill. 31.

The principal reason urged for a reversal of the judgment is, that neither the magistrate nor the circuit

court had jurisdiction to proceed in the matter of the assessment of damages. This question was raised on the motion to dismiss the proceedings before the magistrate. also on appeal in the circuit court, and is properly before us for consideration and determination. This is a statutory proceeding; and the statutory mode of ascertaining and allowing damages to land owners who are damaged by the laying out or altering or widening or vacating a road. The statute provides, that these damages are to be ascertained and allowed after certain requirements are complied with, which confer authority on the highway commissioners or in case of an appeal from the decision of the highway commissioners, to proceed in the matter of laying out a public road; or a private and public road, provided for by Sec. 98 of the act referred to. The general rule of law is well settled that in a statutory proceeding, compliance with the preliminary requisites upon which the jurisdiction of the subject matter depends, must appear. La Salle OH Co. v. LaSalle A Co. 289 Ill. 194.

Section 98 of the Road & Bridge Act, under which the petition to lay out the road in question was filed, and in connection with which this proceeding to assess damages was instituted, provides, that the county superintendent of highways shall have authority to act in the matter of the laying out of the road upon appeal from the decision of the commissioners of highways denying the prayer of the petition; his authority to act in matters of this kind is confined to cases of appeal. The section referred to also provides, that when he grants the prayer of a petition on appeal, the same proceeding shall be had as in the case of laying out a public road.

It also provides, concerning the damages to be assessed, that "in case such damages cannot be determined or apportioned, the same shall be fixed as in case of public roads."

The county superintendent has no authority to present a certificate to a justice of the epace, or magistrate, unless he himself had jurisdiction to proceed with the matter of establishing the road; and the power of the justice of the peace to proceed in the matter of the as-

sessment of damages is derived from the certificate when it is filed with authority. Highways Commissoners v. Smith 217 Ill. 250. It is evident therefore, that in order to give the justice of the peace jurisdiction in the matter of the assessment of damages, the jurisditcional facts should appear, either from the certificate filed, or from competent evidence, namely, that the officer filing the certificate has authority to file it; that he has complied with the preliminary requisites fixed by the statute under Sections 78, 79 and 82, which are con-

ditions precedent, to his authority for filing the certificate with the justice of the peace; and, to give the justice jurisdiction to proceed. Chaplin v. Highway Com. 129 Ill. 651; Town of Pleasant Hill v. Stark 214 Ill. App. 166. In this case neither the certificate filed by the county superintendent, nor any evidence adduced on the hearing before the magistrate or in the circuit court shows, that the county superintendent in granting the prayer of the petition to lay out the road, acted upon appeal from the decision of the county commissioners denying the prayer of the petition; nor, that prior to the filing of the certificate, the county superintendent had made an effort to secure an agreement with the land owners as to the total amount of the damages to be paid; or the portion if any, to be paid by the town, or to be paid by the land owners benefitted; or that such an arrangement could not be made; all these are necessary prerequisites under Section 98 of the act referred to, to give the county superintendent authority to file the certificate, and to confer jurisdiction upon the justice of the peace or magistrate to proceed in the matter of the assessment of damages. Reed v. O. & M. Ry. Co. 126 Ill. 48; Town of Pleasant Hill v. Stark 277 Ill. 302.

For the reasons stated, we are of opinion that the magistrate did not have jurisdiction to proceed in the matter of assessment of damages for the laying out of the road in question; and the circuit court on appeal had no greater jurisdiction than that possessed by the magistrate. Road District v. McKinney 299 Ill. 130.

The judgment is therefore reversed and the cause remanded with directions to dismiss the proceedings.

General No. 7558 Agenda No. 5

April Term A. D. 1923

People, etc., Defendant in Error

vs.

O. L. Tilley, Alias Otto L. Tilley, Plaintiq in Error

Error to Shelby County Circuit Court.

SHURTLEFF, J.

Plaintiff in Error was indicted at the March Term, 1922, of the Shelby County Circuit Court for falsely and designedly representing and pretending, in a certain writing, signed by him, on the 27th day of August, 1921, to the State Bank of Cowden, among other things, that his liabilities, other than what he owed The State Bank of Cowden, consisted of bills payable for papers sold or at other banks $120.00 and other bills payable $175.00, when in truth and in fact said statements were untrue, and were known to plaintiff in error to be untrue and were made to secure an extension of credit upon sucn statements, and that said State Bank of Cowden, relying upon such statements, granted, and plaintiff in error obtained, an extension of credit from said Bank in a large sum of money, based upon such false statements.

There was a trial by jury, a verdict of guilty, a motion for new trial overruled, and plaintiff in error was convicted and sentenced.

Plaintiff in error made two written statements to the State Bank of Cowden,—one upon September 1, 1920 in which is the statement "Bills payable to own bank $1,205.00, open accounts $300.00; total $1505.00, and as to other indebtedness, "none."

On May 9, 1921, plaintiff in error made another statement to the Cowden Bank to secure the extension of a note he then owed to the Cowden Bank, and which statement forms the basis of the charge in this case, in which it is stated: "Liabilities: Bills payable to own Bank $1205.00; bills payable for paper sold at other banks $120.00; other bills payable $175.00; Total $1500.00; accomodation indorsements $50.00," with other matters in said statements not in controversy in this case. Plaintiff in error lived about

two and one-half miles from Tower Hill and had had dealings with the Bank at Tower Hill and at the time these statements were made he was indebted to The Tower Hill Bank in the sum of $1111.34 and interest, which was not paid. Plaintiff in error lived about ten miles from Cowden and had transacted some business with the Cowden Bank prior to September 1, 1920. He was indebted to The State Bank of Cowden when the first statement was made September 1, 1920. There is some dispute as to the amount of this indebtedness at that time. The Cashier of the Cowden Bank states it was $1205.00 but he is not certain whether any note had ever been taken for it, and is not certain as to the exact amount of the indebtedness, but states it from the figures in plaintiff in error's statement. He states that plaintiff in error had given the Cowden Bank "several notes altogether, I don't know how many; there were renewals and extensions and condensing." No notes were produced or offered in evidence. The Cashier states that he knew plaintiff in error, had had dealings with the Tower Hill Bank. Plaintiff in error contends that the Bank officers made all the entries in the statements; that the larger part of these statements were so made without asking any questions; that the officers of the Bank knew as

much about his business as he knew himself and he contends that the item of indebtedness—$1205.00—to "his own Bank," was stated by him, and meant and intended, and understood by the Bank, to be his indebtedness to the Bank at Tower Hill.

Both sides do agree that plaintiff in error was indebted to the Cowden Bank on May 9, 1921, and that the Bank held a note for such indebtedness. The Bank officers were not able to state the exact amount of the note. Plaintiff in error had become a bankrupt and the notes were among the bankrupcy files. The Cashier thinks it was a little over One Thousand dollars on that day. Plaintiff in error states that he owed the Cowden Bank One Thousand dollars at that time, which was in a note, and that a new note was made out and handed him for $975.00, which plaintiff in error was to sign and

bring in with $25.00 in currency to pay upon and extend the balance of the indebtedness. Plaintiff in error states that he signed and mailed back the $975.00 note to the Cowden Bank, the next day, and that later he went to the Bank to pay the $25.00 in interest but the Bank refused to receive the money and had already commenced suit on the indebtedness, holding both notes. Moore, the cashier, testified: "I think we have in the files the note executed May 9, 1921, and also another one we took for the same indebtedness, **because he hadn't paid either one.**" Under this evidence, it is conceded that the Cowden Bank had retained the old note and brought suit upon it against plaintiff in error, in which case, the Bank could not have extended any credit to plaintiff in error, based upon a false statement or in any other manner. No credit or extension was obtained or granted. Plaintiff in error asked instructions which were

refused based upon this phase of the case. The indictment is based upon a false statement charged to have been made upon August 27, 1921. Two statements are shown, covering different dates, and it is argued that the People may as well have counted upon one as the other, and that neither are sufficient to meet the charge. Other errors are assigned which we do not deem it necessary to set out for a decision of the case. No extension of credit having been granted, as charged in the indictment, the plaintiff in error was wrongfully conivcted and the judgment is reversed.

Judgment Reversed.

General No. 7561 Agenda No. 8

April Term A. D. 1923

Elmatern G. Simpson, Appellee

vs.

William O. Simpson, Appellant

Appeal from the Circuit Court of Edgar County.

SHURTLEFF, J.

Appellee brought this suit upon a note for $1700.00 given him by his son, appellant.

The father owned thirty acres of land, mortgaged for $800.00 and requiring the sum of one thousand dollars, entered into an arrangement to sell and convey the land to the son, for a consideration of $3500.00, as claimed by the father, appellee, to be paid $1000.00 in cash, and a note for $1700.00 and the son, appellant, was to assume the payment of the mortgage, and it was understood, as claimed by both parties, that at the end of a year tne father could buy the land back by returning the consideration. During the year, the father had moved to a house in the country, which had burned down, destroying the note with the other contents of the house. At the end of the year, the father, appellee, offered to pay back the consideration for the deed and receive a conveyance of the land, and the son refusing to convey, the father demanded payment of the note, and the same not being paid, brought this suit.

Appellant denies that there was any note given, and insists that the consideration for the deed was the sum of $1800.00 which had been fully paid. There was a trial by jury, verdict and judgment for appellee, from which judgment appellant has appealed.

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There is a motion to dismiss the appeal, taken with the case. The judgment was entered November 25, 1922, to which exceptions were allowed to defendant and an appeal granted, on the same day, to this court, upon appellants filing a bond within thirty days and bill of exceptions within ninety days.

On the 19th day of December, 1922, appellant filed a motion, in the lower court, to set aside the verdict and judgment in said cause, the motion being based upon the

affidavits of two of the jurymen who sat upon the trial, stating that they had been misled as to the evidence of one of the witnesses and had ascribed to such testimony an erroneous legal effect. This motion was denied by the court on December 19, 1922, and an exception allowed by the court to the ruling and an appeal was prayed for and allowed by the court, from this ruling, conditioned upon a bond being filed within thirty days, by the defendant, in the same amount as in the former order, and bill of exceptions was to be filed within ninety days.

The appeal bond, in proper amount, was filed with the clerk of the lower court upon December 30 and recites: "That whereas, etc. * * * * obtain a judgment against the above bounden William O. Simpson for the sum of seventeen hundred dollars and no cents and costs of suit, which judgment the said William O. Simpson asked to be vacated and set aside and the verdict of the jury set aside and a new trial granted on the 19th day of December, 1922, which motion was overruled by the court, from which judgment the said Willliam O. Simpson has prayed for and obtained an appeal, etc."

It is obvious that the bond for appeal, not having been filed within thirty days from the entry of judgment November 25, 1922, cannot have the effect of perfecting an appeal from that judgment.

First Congregational Church v. Page 255 Ill. 267. The right of appeal is purely statutory and the statute must be complied with or the right to appeal is lost, and after the right to appeal is lost, or pending the statutory period or time limited by court, the right to appeal cannot be restored or the time within which to file bond or perfect the same, extended by a motion to vacate the judgment or order appealed from: 3 Corpus Juris, 1054, Section 1051; **Quinn Chapel v. Pease,** 66 Ill. App. 552; **Marder, Luse & Co. v. Campbell Printing Co.** 76 Ill. App. 431.

The order of Court of December 19, 1922, overruling appellant's motion to vacate the judgment and verdict of the jury and grant a new trial, was a final and appealable order and we see no reason why the appeal was not properly perfected from that order. Such appeal has

the effect of bringing before this Court for review any error of the lower court in denying appellant's motion to vacate said judgment and grant a new trial and no other question. This motion was based upon the affidavits of two jurymen made separately, stating: "That (each of them) they arrived at the verdict and found a verdict in favor of the plaintiff and against the defendant on the ground that the plaintiff was corroborated in his testimony by the testimony of Stella Nichols, who was permitted by the Court to testify that she saw the note of the defendant in the possession of the plaintiff." The Court properly overruled this motion. Affidavits cannot be received to avoid a verdict, when they show matters resting in the breast of the juror, such as that he did not understand the evidence or instructions, or that he was mistaken in his calculation or judgment. **Sanitary District of Chicago v. Cullerton,** 147 Ill. 385. The jurors cannot be heard to say that in arriving at their verdict, they ignored

certain evidence which had been admitted or did not give any consideration whatever to certain instructions, to impeach their verdict. **People v. Dusan,** 272 Ill. 478. No case can be found where the jurors, after having consented to the verdict, have been permitted afterwards, for the purpose of setting it aside, to explain by affidavits the ground or train of reasoning by which they arrived at the result. **Smith v. Eames,** 4 Ill. 76; **Smith v. Smith,** 169 Ill. 623; **Sanitary District of Chicago v. Cullerton, supra.**

We have examined the entire record in this case. The witness Stella Nichols did not testify, as stated in the affidavits. She did testify that she saw a paper or note having the figures $1700.00 and the name "William Simpson" appearing as maker and the name "E. G. Simpson" appearing as payee thereon, and to this extent the witness did offer some testimony that tended to corroborate the appellee, but she did not testify that it was appellant's note. The consideration stated in the deed of "$3500.00" was also a corroboration of appellee's theory of the case. The case was tried upon an issue of fact, as to the execution and existence of a promissory note, which the testimony tended to show had been

burned and destroyed without the fault or negligence of the holder or of any other person. There was no errors in the Court's rulings on the admission or rejection of evidence. The jury saw and heard the witnesses and we are satisfied that their verdict is clearly sustained by the evidence. There was no error in the giving of instructions. Appellant offered and the Court refused to give, in behalf of appellant, instructions, "that before the plaintiff can recover upon a lost note, as described in his declaration, he must prove beyond all reasonable doubt, that he had the note of

the defendant," and other similar instructions, requiring appellee's proof to establish his case beyond all reasonable doubt. We do not understand that these instructions state the law, as applied in this state. Counsel for appellant present no authority from decisions of our courts. It has been held in **Carrico v. Whipple,** 305 Ill. 169, based upon public policy:

"A party seeking to establish the existence and contents of a lost deed by parol testimony must bear the burden of making such proof in a clear and conclusive manner. Deeds are evidence of title. Public policy demands that if they be lost the proof of former existence and contents should be strong and conclusive before the Court will establish title to property by parol testimony. (**Shipley v. Shipley,** 274 Ill. 506; **Bennett v. Waller,** 23 id. 97.)"

But this rule does not apply to promissory notes and appellant's instructions called for a more rigorous rule of proof than is required where land titles are involved.

There is no merit in appellant's assignment of errors as to any part of the record, and there being no error in denying appellant's motion to vacate the judgment and verdict, in the lower court and grant appellant a new trial, the order and judgment of the Circuit Court is affirmed.

Affirmed.

General No. 7568. Agenda No. 14.

April Term A. D. 1923

National Bond & Investment Company, a Corporation,

Appellant,

vs.

A. J. Jex and Elmer Jex, Appellees.

Appeal from Circuit Court of Pike County.

SHURTLEFF, J.

This is an action of Replevin brought by plaintiff appellant against appellees to recover the possession of a Ford car. The declaration contained two counts—the first for a wrongful taking and the second count for the wrongful detention of the car. The declaration did not allege a demand. Appellees presented five pleas: the first denied the taking; second, denied the wrongful detention; third, plea of property in the defendant, Elmer Jex; four, denied the corporate existence of appellant; and plea five, denied a license to the plaintiff company to transact business in Illinois. There was a joinder on the first two pleas, and replications to the third, fourth and fifth pleas, denying property in defendant Elmer Jex and averring property in the plaintiff and alleging the corporate existence of the plaintiff company and its license to do business in Illinois, and there was a joinder on the replications to the third, fourth and fifth pleas. A jury was waived and the cause submitted to the Court and a finding and judgment for the defendants, from which the appellant has prosecuted this appeal.

It will only be necessary to consider the second count of appellant's declaration, the second and third pleas of the appellees and appellant's replication to the third plea.

Appellant, a regular organized corporation of the State of Missouri, having an office at St. Louis and licensed to do business in Illinois, was the owner of certain notes and a chattel mortgage, by assignment, executed November 8, 1921, by one E. C. Dunne, in the State of Missouri, for part of the purchase price of said Ford car. Dunne lived in Hannible, Missouri, and the sale was consummated in Hannible and the mortgage in proper form,

duly filed for record and recorded in the State of Missouri. There were twelve notes, each for the sum of $40.-64, dated November 8, 1921, secured by said mortgage, covering said car, coming due, one each month, commencing four months after date. The car was sold to Dunne by the Pine Motor Company, and the notes and mortgage indorsed and assigned over to appellant on the day they were executed.

In the latter part of March, 1922, Dunne, having the car in Pike County, this state, it was seized by the Sheriff of Pike County, upon an execution in his hands against Dunne, issued out of the Pike County Court, and upon proper notices given, the car sold to satisfy said execution. The appellee A. J. Jex purchased the car at the execution sale and appllees offer testimony tending to show that the purchase was made, in behalf of his son, Elmer Jex, the other appellee. The car was later found in the possession of Elmer Jex..

Appellees contend that, if appellant in this suit relies upon a special interest in the property to recover, appellant should have pleaded such special interest, in appellant's replication to appellees' third count, which alleged ownership of the property

in the defendant, and that appellant, having traversed said plea, and alleged ownership in the plaintiff, has made the issue in this case so that appellant can only recover by proving ownership.

Counsel for appellees in their brief insist: "That the allegation: "Plaintiff is the owner of the property and entitled to the possession thereof, 'the latter clause is ' idle and nugatory; it adds nothing to the right or title of the plaintiff and is to be overlooked as surplusage.' If plaintiff was the owner of the chattel, the law implies that it was 'entitled to the possession.' "

We quote this language used by appellant as it equally applies to either party pleading title.

Appellant's second count is based only upon a wrongful detention of the car. Appellees pleaded second, "non **detinet,"** and third, "property in the defendants." In any event there remains appellant's second count for wrongful detention, and appellees' second plea of **non**

detinet upon which issue was joined.

We do not think appellant is required to set out the particular evidence that entitles it to possession, under our form of pleading.

Under our statute Replevin may be brought whenever "goods or chattels * * * shall be wrongfully detained." (Chap. 119, Sec. 1, Rev. St.) Section four of the same Act provides what matters are to be set out in the affidavit of Replevin and it contains no such requirement.

In **Blakely Printing Co. v. Pease,** 95 Ill. App. 344, it was held: "Under the plea of property in Cameron, a stranger to the action, with the denial of the right of property in the plaintiff, the only issuable fact was the right of property in the plaintiff,

and it is sufficient, if the plaintiff has a special interest in the property entitling him to possession. **Constantine v. Foster,** 57 Ill. 36; **Van Namee v. Bradley,** 69 Ill. 299; **Cummins v. Holmes,** 109 Ill. 15; **McFarland v. McClennan,** 3 Ill. App. 295; **Anderson v. Hapler,** 34 Ill. 436."

In **Van Namee v. Bradley, supra,** it is held (page 301) that: "As against a wrong doer, prior possession, alone, is sufficient to enable the plaintiff to maintain the action," and in **Fullerton v. Morse,** 162 Ill. 45, the Court, adopting the opinion of the Appellate Court said:

"We are of the opinion that the language of the statute, 'or person entitled to their possession,' is declaratory of the common law, and intended to distinguish from the absolute owner a person having a qualified or special interest, legal or equitable, in the property itself."

We are unable to find any authority in Illinois supporting appellees' contention that appellant should have pleaded the particulars of its chattel mortgage. Neither do we concur in the view that appellant's replication to appellees' third plea, denying title in appellee, and again asserting ownership in plaintiff, had the effect of narrowing the issues in this case to appellant's ownership. Appellees' plea of property in defendants is merely inducement and traverses the plaintiff's allegation of ownership in the property and merely raises the issue as to

plaintiff's right of property and right of possession. **Constantine v. Foster,** 57 Ill. 38; **Van Namee v. Bradley, supra,** page 300; **McFarlin v. McClennan,** 3 Ill. App. 295; **Rosengren v. Manufacturers National Bank,** 220 Ill. App. 619.

It was held in **Van Namee v. Bradley, supra,** that the pleas of **"non cenit"** and **"non detinet"** concede the right of property to

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be in plaintiff and only put in issue its caption and detention.

The case was tried without objection upon appellant's second count in the declaration and appellees' third plea of ownership in Elmer Jex, under which appellees were permitted without objection to offer proof of appellees' ownership derived through execution sale.

At the commencement of this suit,one, if not two of the notes in question, was past due and defaulted and the mortgaged property had been removed from the State of Missouri, either of which facts, under the terms of the mortgage, entitled the mortgagee to take possession of the said Ford car.

It is contended in affirmance of the judgment that a chattel mortgage, executed in Missouri, should not be enforced in this state, when its enforcement operates to the injury of an Illinois citizen, who has purchased the property in good faith, and appellee cites **Rosenbaum v. Daws,** 77 Ill. App. 309. If this were a question of first impression in our courts, more consideration should be given to it, but the same question has been before the Supreme Court and the Appellate courts in **Mumford v. Canty,** 50 Ill. 370; **Armitage Hurschell Co. v. Potter,** 93 Ill. App. 602; **Farmers & Merchants Bank v. Arnold,** 58 Ill. App. 349; **Wolf & Son v. Shannon,** 50 Ill. App. 396; II Corpus Juris, page 424, and the rule settled, that contracts made in another state, will be enforced in this state where they are not based upon an immoral or criminal consideration and are not against the Public Policy of this state. Appellees have urged the above grounds for the affirmance of the judgment, regardless of the errors assigned by appellant.

Appellant submitted, and the Court refused, the following proposition of law:

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"Wherever a defendant in replevin pleads title in himself and contends upon the trial that he owns the property, as against the plaintiff, no demand for possession is necessary before bringing the action."

Appellant contends and has assigned error:

First. That no demand was necessary;

Second. That a demand was made; and

Third, That where it is shown that a demand would have been unavailing, such demand is unnecessary.

The evidence shows that appellee A. J. Jex bought the car and paid for it, at sheriff's sale, through a friend. Appellee A. J. Jex conducted a business under the name of The Jex Carriage and Harness Co. at Pittsfield, and after the purchase the car was stored in the warehouse of A. J. Jex for a period of time. In the meantime an arrangement had been made between appellees A. J. Jex and his son, Elmer Jex, whereby the son was to become the owner of the car and the son partially paid his father for the car and arranged as to the balance. Prior to the commencement of this suit, appellant, through its agent, went to the place of business of A. J. Jex and made a demand upon A. J. Jex for the car. The agent and A. J. Jex went two doors east of the Jex place and found appellee Elmer Jex working on this car. The father, A. J. Jex, said in the presence of his son Elmer and the agent: "Here is somebody who has a claim against the car, but we are not going to deliver it up until he proves it." The son made no response. The suit was started two or three days later and a writ of Replevin issued. It was two or three months after and after the issuing of alis writs before the car was taken by the sheriff and then it was found in a shed back of the A. J. Jex

place of business. Appellee, Elmer Jex, testified that his father called him out to the sidewalk; that his father said: "A man is looking up that car you bought. He introduced me to Mr. McKasson. I don't remember what else he said, except a man is looking up that car. He said nothing more to me. When this suit was first brought I had a writ of replevin served on me. The car at that time was ———. Soon after that I took the

car to my father's garage. I took it there because that is where I always kept it. When the sheriff found it, it was in a little barn back of the shop. I had control of that barn. I rented it from Miss Clague. I had it closed up. It had been in there two or three months when the sheriff found it."

Appellant contends that no demand for the car was necessary in this case, as appellees pleaded property in Elmer Jex and contended for a return of the property. The issue is raised squarely in this case, whether, when the defendant pleads property in the defendant, a prior demand is necessary and appellant cites: **Badger v. Batavia Paper Mfg. Co.** 70 Ill. 302, and **Kingman & Co. v. Reinemer,** 58 Ill. App. 173. In the Badger case the holding is not based upon the pleadings, but as said by the court (page 305); "No demand was necessary, under the circumstances detailed by witnesses for the plaintiff. If upon attempting to remove the boiler, they were forbidden to do so, as testified to, that would constitute a conversion of the property, without making a demand of it." And in the Kingman case the issue was, whether fraud entered into the execution of the judgment notes, which were the basis of defendant's right to possession, and no question of pleadings was raised in the case, and it was held that a demand was not necessary in harmony with the rule laid down in **Butters v. Haughwout,** 42 Ill. 18; **Hardy v. Keeler,** 56 Ill. 152 and **Far-**

well v. Hanchett, 120 Ill. 573. As contended by appellee, where a person has lawful possession of goods, replevin does not lie until after demand and refusal. **Smith v. Gehrke,** 189 Ill. App. 382; **Rosenbaum v. Dawes,** 77 Ill. App. 295; **Ohio & M. R. Co. v. Noe,** 77 Ill. 513; **Clark v Lewis,** 35 Ill. 417; **Rosenbaum v. King,** 114 Ill. App. 648, and **Wabash R. Co. v. House,** 101 Ill. App. 397.

There is extensive authority in other states, holding that when defendant pleads property in the defendant, such pleading waives the necessity of proving a demand. **Wells on Replevin,** Sec. 374; Cyc. Vol. 34, page 1491; Am. & Eng. Encly. of Law, (1st Ed.) Vol. 5, page 528, and in Cyc. supra, Vol. 34, page 1491, it is said: "The making

of a demand by plaintiff prior to the commencement of the suit for the return of the property is not in issue and need not be proved, where defendant, either by his pleading or his evidence, asserts ownership or right to possession in himself and demands a return of the property," and there is much reason in this rule. Puterbaugh, page 532, (1888) lays down the rule that, "Upon a plea of property in the defendant or in a stranger, in an action of Replevin, the material inquiry will be as to the property of the plaintiff in the goods, which he must be prepared to prove, the **onus probandi** of this issue being on him."

In **Amos v. Sinnot, 4th Scammon**, page 440, it was held that the plea of property in the defendant, in an action of Replevin, throws the burden of proof upon the defendant, and if that rule were still adhered to in this state, we should be inclined to hold with appellant upon that question, but by the later rule and decisions, as shown in **Constantine v. Foster, supra,** and other cases cited in this opinion, we are inclined to hold that it is

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not the law, in this state, in every case where the defendant has lawfully come into the possession of goods and chattels and pleads property in the defendant, thus putting plaintiff to the proof of his title and right of possession, that a demand is unnecessary. The better rule, in the opinion of this Court, and the one heretofore fully recognized by our courts, is, that where the evidence shows that a demand for the property would have been unavailing, no demand is necessary: **Johnson v. Howe,** 7 Ill. 342; **Dairy Co. v. Penn. Co.** 291 Ill. 248; **Dinomaker v. Rose,** 62 Ill. App. 118 and **Columbus Buggy Co. v. Empire Co. etc.** 198 Ill. App. 421, and the further rule that where it is shown that the defendant has converted the property, no demand is necessary. **Sinamaker v. Rose, supra; Knight v. Seney,** 290 Ill. 11; **Follett v. Edwards,** 30 Ill. App. 386; **Burge v. Motor Car** Co. 213 Ill. App. 357, **and Ingalls v. Bulkley,** 15 Ill. 224.

A demand and refusal do not constitute conversion; they are, at the most, but evidence of a conversion. **Rosenbaum v. Dawes,** 77 Ill. App. 309 and cases cited.

In **Kee &Chappell Co. v. Pennsylvania Co., supra,**

plaintiff identified a quantity of milk bottles, in the possession of defendant, that had been received by defendant, from another shipper, in the regular course of carriage. It was shown that plaintiff's agent went to and talked with the chief or assistant freight agent of defendant, saying that, "there was a car load of milk bottles going away which belonged to the people he represented and that he was going to take those bottles out, to which the reply was made that if he took them he would have to do so legally."

The Court say (page 255): "Even though this be considered not sufficient as a demand, it is sufficient to show that a demand would have been unavailing and therefore unnecessary, as the effect

of appellant's statement was that it would not surrender the property without a writ being issued, while a demand is usually necessary where the defendant comes into possession of the goods rightfully, yet where the circumstances show that demand would be unavailing such demand is not necessary. **Cranz v. Krager,** 22 Ill. 74; **Johnson v. Howe,** 2 Gil. 342."

In **New Columbus Buggy Co. v. Empire Co. supra,** the Court said (page 423):

"Even though the technicality '(an insufficient demand)' were availing, yet as appellant then and there made an absolute refusal to deliver the goods except on a Replevin, appellee was excused from the necessity of any further demand before bringing suit." Likewise, it is held in **Follett v. Edwards, supra,** and **Knight v. Seney, supra,** that any distinct act of dominion wrongfully exerted over another's property in denial of his right, or inconsistent with it, is a conversion and thereafter no demand is necessary.

Construing the conduct of the parties to this suit, in conjunction with these principles of law, appellant holding a good and valid mortgage upon said car, with the right, by the terms of the mortgage, to take possession of the car, made a demand upon appellee A. J. Jex for the car, and while a technical demand was not made upon appellee, Elmer Jex, appellee A. J. Jex did state to

his son Elmer Jex and to appellant's agent, and in the presence of both: "Here is somebody who has a claim against the car, but we are not going to deliver it up until he proves it." The son's silence was an acquiescence in the statement of the father, and further tends to show the joint dominion of the father and son over the car.

If anything further was needed to show that a further demand would have been unavailing and that the car had been converted, it is amply furnished in the testimony of the son, when he states that after several months and the issue of alias writs, he made it necessary for the officer "to find" the car in a rear barn, which he "had closed up."

No further demand was necessary in this case. There is no question of agency in this case as argued by appellees. No question was raised by appellees as to McKasson's authority to act for appellant, when he was seeking the car (**Ingalls v. Bulkley,** 15 Ill. 224) and as to what took place when appellant's agent and the appellees talked about the car before the suit was started, does not involve the question of agency.

Appellant submitted to the court its fourth proposition of law as follows:

"Proposition Fourth: Where a defendant meets the authorized agent of the plaintiff in the presence of another person and such other person says in the presence of both the defendant and such authorized agent, that the authorized agent is demanding possession or making claim to the property in question but that he can not have it until he proves his title and the defendant makes no objection or protest to that statement this is in law a sufficient demand and refusal."

This proposition the court marked "Refused" and in this the Court erred. The Court should have held this proposition as law in this case and entered a judgment for the plaintiff.

For the error as pointed out in this opinion, the judgment of the lower court is reversed and judgment is entered in this court: That the appellant is entitled to the possession of

the car in question as its special interest appears by the said notes and chattel mortgage, and that the appellant have and recover from the appellees the possession of said Ford car for the purposes set forth and to the extent of the interest described in said chattel mortgages and one cent damages.

Reversed. Finding of Fact to be incorporated as a part of the judgment :—We find as an ultimate fact, that the appellant, plaintiff below, was entitled, as mortgagee, to the possession of the car in question.

General No. 7571 Agenda No. 17.

April Term A. D. 1923

Robert Sheehan, a Minor, by Next Friend, Appellant,

vs.

Grover Bernard, Appellee.

Appeal from the Cirucit Court of Sangamon County.

SHURTLEFF, J.

This is an action brought by appellant, a minor, for injuries growing out of an automobile accident. Appellant's declaration contains seven counts and an additional count. The seven counts charge negligence on the part of appellee, in the driving and operation of his car, the proximate result of which was the injury of appellant and the additional count charges a wilful and wanton injury to appellant.

Appellee pleaded the general issue. There was a trial and verdict and judgment for appellee, in bar of the action, to which appellant duly excepted and the case is brought to this court by appeal.

Appellant assigns error upon the court's refusal to give the jury instructions under the additional count of the declaration, properly tendered, and, specifically, for giving appellee's 5th instruction, charging the jury to "disregard said additional count filed by the plaintiff, by leave of court, charging the defendant with **wanton and wilful negligence.**"

The injury occurred on South Fifth street, near Laurel, in the City of Springfield, on the 31st day of January, 1922, at about five or half past five o'clock in the afternoon.

Appellant was a boy twelve years of age. Appellant, with his brother and mother, in a Ford car were driving south on Fifth street and stopped, close to the curb, on the west side of the street, about 39 feet north of Laurel street, which crosses Fifth street. There was a vacant lot west from where the Ford car stood. The east side of Fifth street was closely built up. There was a drug store on the northeast corner of Fifth street and Laurel and a grocery store immediately uorth of the drug store and dwelling houses compactly built north of

the grocery store on the east side of Fifth street. The west side of Fifth street was not so compactly built, having some vacant lots. Two lines of street car tracks paralleled each other, north and south in Fifth street, and cars ran every seven minutes. Fifth street was much used for traffic but no machines, except appellees and the Ford car, were seen in this vicinity at or about the time of the injury. Fifth street is 44 feet wide from curb to curb and Grand Avenue is about 700 feet north of the place of injury. Appellant, with his brother and mother had stopped on the west side of the street, so that appellant could get out on the west side of the car and go across to the grocery, on the east side of the street, on an errand and appellant got out on the west side of the Ford car, upon the curbing, and went around in front of the car to go to the grocery store on the east side of the street. There was ample room between the Ford car and the west car rail for another car to pass. Up to this point, there seems to be no controversy about the prysical surroundings or the facts.

Appellant presented the testimony of several witnesses, one a pedestrain upon the street who saw the whole situation and the accident, another, the proprietor of the grocery store, who stood

ten to fifteen feet back from the front of the store and nearly opposite the Ford car, and who saw the accident, and in addition the testimony of the brother, sixteen years of age, the mother, as well as appellant's own testimony. This testimony, if standing alone, tended to show that appellant went around the front of the Ford car and started for the grocery store and when he had gotten five or six feet away from the car, his brother called him back to the Ford car and the boy returned to the side of the Ford car, and the brother, the driver, sitting in the Ford car, handed appellant a dollar to pay for groceries; that appellant at once turned to the east and walked towards the grocery store. Upon first starting to cross the street he had looked north and had seen no street car coming south on the west side of the street, nor any automobile or other object in the street. He says he

particularly observed the space to the west of the car tracks and he looked south. Witnesses testify that the street was dry, and that it was light, "clear as day" and that one could easily see and observe, at that time, any object in the street northward to Grand Avenue. Appellant had proceeded to about the center of the northbound (easterly) tracks when he was struck by appellee's heavy Nash car, running at a speed from 25 to 40 miles per hour, as indicated, by various speeds, as the different witnesses observed the speed. Appellant was in the center of the east, or northbound, car tracks when struck, and appellee's car was running, the west wheels between the rails of the northbound track, and the east wheels over the east rail towards the east curb; that appellee sounded no horn and gave no signal, and did not stop his car until it had run 83 feet from the place of collision. The witness Grubb, a pedestrain, had seen appellee's car coming south from a point

75 feet

north of witness, probably one hunderd or one hundred and twenty feet from the point of the accident; the groceryman from a point twenty feet north of the point of the accident and the brother saw appellee's car about five feet north of the point of collision. All say that the car was east of the center of the street and running south in a straight line. Appellee's car was inclosed but he had a clear view of the street through the windshield and appellee testifies that when he turned into Fifth street from Grand Avenue, he had a clear view of the street for two blocks away.

It is true, appellee presents an entirely different theory of the controversy, and corroborates his testimony by witnesses who saw the accident. We are not weighing the evidence, or even discussing on which side the preponderance of the evidence lay, or criticising the verdict of the jury.

Appellant insists that evidence was submitted that entitled appellant to have the same considered under the additional count in the declaration, as to a wilful and wanton injury. In the case as made by appellant's witnesses, if uncontradicted it shows or tends to show,

that appellee, with a clear view of the street for two blocks, with no other traffic in view or blocking the way, driving on the wrong side of the street, going at a speed of 25 to 30 miles per hour, and one witness states at 35 to 40 miles per hour, and going in a straight direction, drove a high powered Nash motor car, without blowing a horn or giving any signal, upon appellant. who was attempting to cross the street, going directly in front of the path of the car and who, apparently, had not seen or heard the car coming and who for twenty-five feet at least, had been in the plain view of appellee.

In such a case it makes no difference whether it is a boy playing ball in the street or a boy crossing the street. So far as this question is concerned, the facts in this case are very similar to the facts in Walldren Express Co. v. Krug, 291 Ill. 472, in which case the plaintiff was a boy just under fifteen years of age, playing ball in the street and was struck by an automobile truck and run over. The court held in that case (page 476:) "Whether the ordinance prohibited the game or not and whether the defendant in error was guilty of contributory negligence or not, the evidence required the submission to the jury of the wanton negligence of the defendant." The court further (page 477) reviewing the testimony and the conduct of the defendant, states:

"That he (plaintiff) was all the time in full view of the persons in the automobile; that they saw him, but did not sound the horn, slacken speed or make any effort to avoid the collision until just before it occurred, when the machine swerved slightly to the left; that with full knowledge that a collision was imminent they deliberately failed to make any effort to avert it and avoid injuring the plaintiff. In this view of the facts the jury might well have concluded that the conduct of the driver showed that conscious indifference to consequences and deliberate purpose not to exercise any care, however apparently necessary for the safety of the boy, which charges his employer with the consequences of a wilful injury. In such case, although the plaintiff is guilty of negligence, he can recover, if the defendant could have avoided the injury by the exercise of ordinary

care. The extent of the plaintiff's negligence is not material in such case. (Lake Shore and Michigan Southern Railway Co. v. Bodemar,

139 Ill. 596.)

Whether the negligent conduct of a defendant, which has resulted in injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a wilful disregard of consequences or a willingness to inflict injury. **(Lake Shore and Michigan Southern Railway Co. v. Bodemar, supra.)** An intentional disregard of a known duty necessary to the safety of the person or property of another and an entire absence of care for the life, person or property of another and an entire absence or care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness such as charges the person whose duty it was to exercise care with the consequences of a wilful injury (1 Thompson on Negligence, Secs. 20, 22.")

The language of the court in Walldren Express Co. v. Krug is as applicable to the facts and testimony in the case at bar as it was in that case. The testimony offered by appellant, if uncontradicted and belived by the jury, would have been sufficient to wararnt a verdict based upon a wilful and wanton injury, and the court erred in withdrawing the additional count and that issue from the consideration of the jury.

Appellant assigns error upon the giving of defendant's 8th instruction, which instructed the jury that if they believed from the evidence that the injury was the result of an unavoidable accident, **'for which neither party was to blame,"** etc. "to find the defendant not guilty,"—in the use of the phrase "to blame," in place of the term negligent,—and appellant assigns error in the giving of defendant's 9th instruction, the same being

peremptory, and based upon the injury being due to the negligence of both parties and not by this or any other instruction defining to the jury of what negligence consists. The giving of the 9th instruction, without defin-

ing negligence, has been condemned, and doubtless defendant's 8th instruction could be couched in more apt legal terms. As the judgment in this case is to be reversed and remanded for another trial, doubtless these subjects of criticism will be avoided on another trial.

For the reasons set out in this opinion, the judgment of the lower court is reversed and remanded to the Circuit Court of Sangamon County for another trial.

Reversed and Remanded.

General No. 7579. Agenda No. 23.

April Term A. D. 1923

H. B. Wright, Appellee,

vs.

V. E. Michael, et al., Appellants.

Appeal from Circuit Court of Edgar County.

SHURTLEFF, J.

Appellee brought suit in Justice Court in Edgar County and upon a trial by jury there was a verdict and judgment for appellee. Appellants appealed the cause to the Circuit Court of Edgar County, and upon a trial by jury there was again a verdict and judgment for appellee in the sum of $42.50, and appellants have brought the case to this court by appeal and assigned error, that the verdict and judgment are against the manifest weight and preponderance of the evidence, and that the same can only be accounted for by the prejudice and passion of the jury, in behalf of appellee.

The cause of action arises out of a charge or commission claimed to have been earned by appellee for the sale of a Buick car to one Banta, for the appellants.

Appellee was employed by appellants about July 1, 1920, under a written contract to sell automobiles upon a commission basis. Appellee was to receive a commission of seven per cent. on all used automobiles that he sold. The appellee procured the purchaser Banta for a Buick car, **that had been used,** in early August, 1921, and the appellee showed the car to Banta and offered a sale of the car to Banta for $750.00, the same to include, as a part of the purchase price, a Cadillac car owned by Banta. Banta did not want

to pay as much difference for the Buick as appellee priced the car, but finally the matter was submitted to Mr. Cushing, one of the appellants, and the price cut to $650.00 and the sale made, but the testimony is uncontradicted that appellee was the procuring cause of the sale, and carried out all of the negotiations with Banta and the only part taken in the matter by appellants was the reduction in price made by Cushing. The only defense made to the merits of this

claim was. that appellee had been told by Cushing, appellant, to "keep his hands off from this car;" that "he," Cushing, "was going to sell this car himself and he did not want appellee to have anything to do with the car;" still, after appellee procures a buyer and negotiates substantially a sale, appellant consents to a reduction in price and permits the sale to be made. This sale was made August 8, 1922. Appellant Micheal testified that the net proceeds of this Buick car to appellants was $900.00. In fact, there is not, seriously, any defense made to this claim, in the form presented.

Appellants presented an offset against appellee, in the form of an account for oil, gasoline, car repairs and including the payment of one note for $414.00 which appellant had signed with appellee, said account computing in the total $950.00 and accruing between April 4th and August 2d, 1921, and upon which credits were allowed to the amount of $693.00, leaving a balance claimed to be due appellants on this offset of $257.00 against appellee. One item of this account against appellee consisted of the payment of a note which appellants had signed with appellee, to pay the unpaid portion of the purchase price of another Buick car, purchased by the appellee, and for which a chattel mortgage had been given, by appellee, to the Buick Company, covering appellee's car.

Appellant had paid this note May 25, 1922, or at least assumed the payment of the note so far as appellee was concerned, and had taken a bill of sale of the car dated the same day, which was signed by appellee, but this bill contained the following clause: "With exception for equity, retained above $400.00 and int. and repair." By this clause and by the testimony of the witnesses it was shown that appellee was to have the proceeds of the car, above the said sum of $400.00, interest, etc. Appellee claims to have made a full settlement with appellants upon July 14, 1922. Apparently, appellee remained in the possession of his car for some time after May 25, 1922, as he was charged with gas and oil periodically up to August 2, 1922.

Appellee testifies that he had a talk July 14, 1922,

with Mr. Cushing, when Mr. Michael and Mrs. Riedell (the bookkeeper were present about a settlement; that, "he owed them and they owed him," and appellee asked Cushing to settle upon this car and upon a commission and Cushing said, "all right," and then appellee stated to Cushing, "I will sell you my car if you will give me $100.00 and turn you over my car and that will make us square," and Cushing said, "no, I will give you $50.00," and appellee says he decided to take the $50.00 and that Cushing asked for a receipt in full which appellee gave him and appellants gave him the check for $50.00. The check appears in evidence signed by appellants by E. J. Cushing and is payable to appellee and by him endorsed in due course.

The appellants Cushing and Micheal contradict appellee's statement as to the settlement. They testify they merely loaned appellee the $50.00. Michael says that on July 14 appellee wanted to draw some money; he asked to draw $100 and Michael says:

"I said, no, he could not draw any, because he was too much in debt now, and we could not let him get in debt any more, and I said: "Buck, you never have made an effort to sell your car and clear up your account, and until then we cannot advance you any more money.' I said: **"The car will do well to bring four hundred dollars."** And he said: **"I will sell the car for $750."** I said: **"If you do so, that would pay your account, and you could have $100."** He said: **"I can sell it for that."**

"There was a check given him on that occasion for $50. Mrs. Riedell wrote it, and Mr. Cushing signed it. No receipt was signed at that time of any character."

Appellant Cushing testified:

"I remember conversation of July 14, 1922, concerning a $50 check. The plaintiff and the bookkeeper, Mrs. Riedell, were present. The plaintiff asked for $100. I told him that he had to get it from Michael like he always did. Michael did not want to give it to him.

Wright said he could sell the **Buick car for $750. Michael said it was only worth $400.** Michael told him that if he could **sell it for $750 there would be a credit coming to him.**

Wright never did sell the car. Michael sold it. We

had other conversations, but do not remember the substance of them. I remember about the Bill of Sale being made in May.

Buck Wright told me that he wished that he had not given Michael the Bill of Sale. He said Michael would not give it back. **Wright said if he did give it back, that he would foreclose the mortgage.**

I do not remember of any settlement on July 14, 1922. **He got the $50 on that date to live on. Every week he would ask for money,**

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and on July 14 asked for money like he had always done. **Said he wanted $100, and we gave him $50.**

Every time Buck Wright asked for money I had to insist on Michael giving him money, from the time he commenced work until he quit. Buck would put items down and charge them to himself."

In appellant's account made up, there are two items of checks charged after July 14, 1922, one July 20th for $42.25 and one August 2d for $15.75. Appellee testified that each of these checks were given him for specific commissions respectively, earned at about those dates, and it is not seriously contended by appellants but that the commissions were earned by appellee.

The bookkeeper, Mrs. Riedell, remembers the conversation of July 14, but paid no attention to it and is not able to state what it was. She drew the checks in favor of appellee. There are some other checks in the account but appellee insists that such checks are in payment of commissions and the record does not disclose the credit account of $693.00 allowed by appellants to appellee, other than the testimoy of Michael that he sold appellee's Buick car cor $400.00.

Appellant Michael, although he was absolutely opposed to advancing money to appellee and in each case had to be persuaded by his partner, Mr. Cushing, further testified:

"The check for $50 was given Wright because he needed money. Did not owe him any money at the time. We advanced him money all the time.

I did not tell Mrs. Riedell that check for $15.75 was

commission on car, but was to pay off a man waiting there that was going to put him in jail if he did not get the money.

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Wright said that he had made a sale on an Overland car and that his commission would run about $15.75, and this check was given for that.

I recall check for $42.25, or Robert's check at Chrisman. That was an advancement of money. All these were advancements because he was indebted to us, and was not entitled to them.

All the checks I gave Wright were for advancement money.

Wright gave the Buick Company a mortgage. I kept it like other mortgages.

I don't remember the date it was given to me. Mr. Wright signed it. No settlement was made with Mr. Wright on July 14, 1922."

Appellee made the sale to Banta August 8th and claimed his commission, which appellants refused to pay, and appellee brought suit the next day.

Evidently appellant in August 1922 took complete possession of the Buick car, in which appellee did have an equity, up to July 14, 1922, and thereafter, in case apellants did not make the settlement on that date as claimed by appellee. Appellants had only a mortgage on this car for $414.00, on their theory of the case, and appellant Michael testified that later he sold the car for $400.00 only, less than the purchase money note, which he had paid, but he does not state when he sold it or to whom it was sold, or any of the circumstances of the sale. If appellant's theory of the case is correct, appellee would be entitled to a full report of the sale, from appellants, which he has never had and there is some evidence in the record from which a jury might infer that the Buick car had a value or would sell for $750.00. Whether the settlement claimed to have been made on July 14, 1922, was actually made, was the main,

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material question submitted to the jury. We are not prepared to hold that the evidence preponderates in favor of the appellee, neither is this court disposed to

hold, as a matter of law, that the verdict is manifestly against the weight and preponderance of the evidence.

The decisions of Illinois Courts are uniform that upon questions of fact where there is a conflict in the evidence, it is a peculiar province of the jury to reconcile and settle the conflict and when a decision is reached, it will not be disturbed unless the finding is clearly and manifestly against the weight of the evidence. **Wickencamp v. Wickencamp,** 77 Ill. 94; **Hand Brewing Co. v. Fetter** 168 Ill App555 a 559; **Weaver v. Gaskins** 180 Ill App 28 a 30; **Mellish-Hayward Co. v. Hass Electric Co.** 181 Ill. App. 664 a 665.

This Court does not weigh the evidence but only determines

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whether or not there is any evidence fairly tending to support the plaintiff's cause for action. **Chenoweth v. Burr,** 242 Ill. 312; **Rathbunn v. Ocean Acc. & Guar. Corp.,** 219 Ill. App. 514 a 522.

The judgment of the Circuit Court of Edgar County is affirmed.

Affirmed.

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General No. 7591. Agenda No. 31.

April Term A. D. 1923

C. H. Harwood, Appellee,

vs.

George A. Kizer and John T. Reynolds, doing business under the firm name and style of the Kizer-Reynolds Motor Co., Appellants.

Appeal from the Circuit Court of Coles County.

SHURTLEFF, J.

This is a suit in assumpsit brought by the appellee against appellants in the Circuit Court of Coles County. This case was tried upon an amended declaration containing two counts, both of which in effect alleged that the appellants sold to appellee, and appellee, at the request of the appellants, purchased from them a Marmon four-passenger touring car, No. 4200927; and further alleges that appellants then promised appellee that in case of any reduction in the retail selling price as fixed by the manufacturer of Marmon four-passenger touring cars between October 17, 1920, and July 2, 1921, the appellants would reimburse the appellee the difference between the price paid by appellee for said automobile purchased by him and the new retail selling price as fixed by the manufacturer of said car, and in reference to such agreement appellant entered into a written contract with appellee, which was in the following words:

"In consideration of $5,300.00 receipt of which is hereby acknowledged, The Kizer-Reynolds Motor Company sell and convey

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to Dr. Harwood 4-passenger Marmon Touring Car Number 4200927.

The Kizer-Reynolds Motor Company agree to guarantee the above car as follows:

1. In case of any reduction in price between October 17, 1920, and July 2, 1921, purchaser will be reimbursed the difference between price paid and new price.

2. Car will be guaranteed as follows: 18 hours free service.

3. One year guarantee on material and workmanship as follows: In case any part of this car proves defec-

tive in material and workmanship in the opinion of The Nordyke & Marmon Co., and they furnish new part, Kizer-Reynolds Motor Co., will install such parts free of charge.

Kizer-Reynolds Motor Co.
J. T. Reynolds
Dr. C. H. Harwood."

The declaration then alleges that the retail selling price of automobiles was then fixed by the manufacturer according to the general usage and custom among automobile dealers and salesmen; that between October 17, 1920, and July 2, 1921, there was a reduction in the retail selling price as fixed by the manufacturer of Marmon four-passenger touring cars in the sum of $1,015.00; that appellants refused to pay said sum to the appellee and that the said sum is now due and owing to appellee from appellants and unpaid.

To this declaration appellants filed a plea of **res adjudicata** and the general issue. A demurrer was filed to the special plea and sustained.

The case was tried before a jury and a verdict rendered against appellants for $1,015.00. There was a motion for a new trial, judg-

ment upon the verdict, to which appellant excepted, and the case is brought to this court by appeal.

Appellants assign error in that the said contract, covering the guaranty as to reduction of price of such cars, was too indefinite and uncertain and therefore unenforcible. We have examined all the cases cited by appellants, but they do not sustain appellants' contention. A person entering into a contract, in the ordinary course of business, is presumed to have done so with reference to any existing general usage or custom relating to such business, whether he knew of the custom or not, and such general custom may be shown by oral testimony. **Steidtmann v. Joseph Lay Co.** 234 Ill. 84; **El Reno Grocery Co. v. Stocking** 293 Ill. 494; **Lyon & Co. v. Culbertson, Blair & Co.** 83 Ill. 36. In all cases it is the duty of courts to uphold rather than to defeat contracts of parties freely and fairly entered into. Courts lean

against the destruction of contracts because of uncertainty and seek to discover and give effect to the intention of the parties so that performance of the contract may be enforced according to the sense in which it was understood at the time it was made. **Ryan v. Hamilton,** 205 Ill. 191. **Minnesota Lumber Co. v. Whitebreast Coal Co.** 160 Ill. 85; **Crabtree v. Hagenbaugh,** 25 Ill. 214; **Benjamin v. McConnell,** 9 Ill. 544; **6 R. C. L.** Section 59, page 645.

It was averred in the declaration and proven undisputably by the testimony that at the time said sale was made the retail selling price of automobiles was then and there fixed by the manufacturer, according to a general custom among automobile dealers and salesmen, and that there was a reduction in the retail selling price, as fixed by the manufacturer, of Marmon Four Passen-

ger touring cars, between October 17, 1920, and July 2, 1921, in the sum of $1015.00. When the terms of this contract are read in conjunction with the custom among dealers and salesmen, there is nothing uncertain, indefinite or in the least ambiguous about the terms of this contract. Under the terms of this contract, appellee was to purchase the car, at the lowest price made to the trade, at any time after October 17, 1920, up to July 2, 1921, and in case of a reduction appellants were to return a portion of the price paid to appellee.

Appellant further assign error, that the contract declared upon is against Public Policy and therefore void; that whatever tends to creat a monopoly is unlawful as being contrary to Public Policy. **The People ex rel v. Chicago Gas Trust Co.** 120 Ill. 293, and the cases there cited.

It is difficult to conceive upon what ground this contract can be said to be against public policy. It merely is an agreement to reimburse the plaintiff if the price goes down within a certain time; to pay a sum of money upon the happening of a certain condition. It in no way prevents other people from engaging in this same business or prevents manufacturers from selling their products to anyone who is willing to buy, nor does it tend to prevent competition or maintain prices. There is noth-

ing in this contract to prevent any individual from selling any property that he has at any price he can get. **This is not a contract between a manufacturer and a dealer. It is one made between a dealer and a purchaser.** The fact that the manufacturer fixed the retail selling price of automobiles did not require the defendants to guarantee the price of this car to the plaintiff. This contract can by no possibility exercise an injurious influence over the community at

large. It has no purpose or tendency to affect anyone but the plaintiff and the defendants. It does not prevent or tend to prevent other people from buying Marmon automobiles or any other kind of automobiles. **Walsh v. Dwight,** 58 N. Y. Supp. 91; **Corn Products Refining Co. v. Oriental Candy Co.** 168 Ill. App. 585; **In re Greene,** 52 Federal, 104; **Minnesota Lumber Co. v. Whitebreast Coal Co.** 56 Ill. App. 248; **Cook v. Meyers,** 166 Ill. 282; **Connolly v. Union Sewer Pipe Co.** 184 U. S. 540; 46 Law Ed. 679. At page 685 of the Law Ed. the Court say:

"In the present case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. **The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proved without any reference to the arrangement whereby the latter became an illegal combination.** If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under

the principles of the common law. **The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe."**

In **Corn Proucts Refining Co. v. Oriental Candy Co., supra,** a contract was made by which a company agreed to sell corn syrup at a certain price on condition that the purchaser purchase exclusively from the company all the glucose and all the corn syrup required by it, whether for resale or for use in its establishment. This contract was held to be legal and binding and not in restraint of trade. It was further held that: "In order for such defense to prevail, the contract sought to be enforced must have been to further the objects of the illegal combination." 6 Ruling Case Law, Sec 217, page 821.

The contract in the case at bar, has no connection with the rule of public policy, restraint of trade or any illegal purchase, even if it should be admitted that the course of dealing among automobile manufacturers and dealers came within the rule. It in not shown that appellee even knew of the custom among manufacturers and dealers in October, 1920, and such custom is shown for the purpose of fully explaining and elucidating appellants' guaranty. There is no merit in appellants" contention.

Appellants further contend that the court erred in sustaining the demurrer to appelants' special plea.

By said special plea, appellant alleged that, after the commencement of this suit, appellants filed their bill in chancery in the Coles County Circuit Court; that in and by the said bill, the complainants therein alleged that a certain guaranty

against price reduction on said Marmon Car, mentioned in plaintiff's declaration, up to July 2, 1921, was procured to be inserted therein by the false and fraudulent representations of the said C. H. Harwood, and in said bill further averred a readiness and willingness to pay to the defendant therein any and all sums that might be found due from the complain-

ants to the defendant, and further prayed for and obtained a temporary restraining order enjoining the defendant from further prosecuting said suit at law against the complainants, George Kizer and John T. Reynolds, and thereafter the said Circuit Court of said Coles County rendered its decree dismissing complainant's said bill for want of equity without awarding to the defendant, C. H. Harwood, any money damages; and the defendants further say that the parties to this and said chancery suit are the same and not other or different persons; and the defendants further say that said Circuit Court of Coles County, in said chancery suit had jurisdiction of the parties, and subject matter involved therein, with full power and authority to hear and determine the whole controversy between them and render a money decree in favor of the defendant and against the complainants in said chancery suit in accordance with the equities of said cause, as by the record and proceedings thereof, remaining in said Circuit Court of Coles County, more fully appears, which said decree still remains in full force and effect; and this the defendant is ready to verify by the said record.

The plea avers jurisdiction on the part of the Court to hear and determine all question of damages, but no facts are set out from which such jurisdiction can be determined. It amounts therefore to a mere conclusion. On the allegations of fraud, the plea alleges that it was determined that the bill was without

equity. No other matter of equity is averred in the plea.

Where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out can not be granted on account of failure of proof or other reason, the court is without jurisdiction to grant any relief based on the legal cause of action, prayed either in the bill or cross bill. **Brauer v. Laughlin,** 235 Ill. 265-272; **Fleming v. Reheis,** 272 Ill. 132-137; **Patterson v. Patterson,** 251 Ill. 153-181; **Linnertz v. Dorway,** 246 Ill. 485-488; **T. St. L. & N. O. R. R. Co. v R. R. Co.,** 208 Ill. 623-632; **Houston v. Maddux** 179 Ill. 377-392; **McCarthy v. Neu,** 93 Ill. 455-456;

Correll v. Freeman, 29 Ill. App. 39-44; **Metz v. McAvoy Brewing Co.** 98 Ill. App. 584-594; **Fuller v. Hansen,** 187 Ill. App. 417-422.

Courts will not permit parties to sue in chancery and upon failure to establish any basis for equitable relief have the cause retained for the purpose of enforcing a purely legal demand, for that would deprive the defendant of his constitutional right of trial by jury. **Brauer v. Laughlin,** 235 Ill. 265-273; **McNulty v. Mt. Morris Electric Light Co.** 172 N. Y. 410, 65 N. E. 196; **Empire Eng. Corp. v. Mack,** 217 N. Y. 85; 111 N. E. 475-478.

The breach of the contract and the question of the defendants' liability upon the same, and how much damages, if any, they owed the plaintiff, were in no way involved or in issue or adjudicated in the equity suit referred to in the pleadings. **Smith v. Rountree,** 185 Ill. 219-223; **Krause v. Nolte,** 217 Ill. 298-304.

The Court very properly sustained the demurrer to appellants' special plea.

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Some objection is raised by appellants as to the testimony of one or two witnesses who testified for appellee, as to the custom and usage among automobile manufacturers and dealers,—that it was hearsay. Appellants offered no testimony. The statements of the witnesses covered and included statements of manufacturers and dealers, with themselves and in connection with the trade, that, in the opinion of this Court, they did have some tendency to establish a usage and custom in trade. However, other witnesses, offered by appellee, testified to facts and circumstancs, unobjected to, which amply and sufficiently established plaintiff's case, so that if the objected testimony should be stricken out, sufficient uncontradicted remains to support the verdict and judgment in this record.

Finding no error in the record the judgment of the Circuit Court of Coles County is affirmed.

Affirmed.

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General No. 7593. Agenda No. 32.

April Term A. D. 1923

Joseph King, doing business under the trade name of Colchester Brick and Tile Company, Appellee,

vs.

Lester L. Butterfield, Appellant (and Edward E. Fairbrother.)

Appeal from Circuit Court of McDonough County.

SHURTLEFF, J.

Appellee filed his petition in the Circuit Court of McDonough County against appellant and Fairbrother, a mortgagee, to foreclose a Mechanic's Lien for brick furnished by appellee in the month of June, 1921, to appellant, to be used in the construction of a swimming pool, upon premises owned by appellant. Appellee alleged in his petition a verbal contract made June 1, 1921, with appellant, by which appellant purchased the brick directly from the appellee for use in said improvement. Appellee, upon leave of Court, filed an amendment to his petition by which was set up a notice of Mechanic's Lien filed in the Circuit Court of McDonough County on October 15, 1921, claiming a lien for the material furnished, under the contract with appellant, and also claiming that, "on the same day claimant agreed to furnish sufficient building tile for the erection of said pool to Claude J. Tiernan and Lewis Tiernan, as Tiernan Brothers; that Butterfield (appellant) knowingly permitted the Tiernan Brothers to contract for the improvement of said property; that claimant furnished 20,500 brick at

an agreed price of $16.00 per thousand under the contract with appellant and 1,680 building tile to the said Tiernan Brothers for said improvement at $75.00 per thousand, and that all of said brick and tile were used in the said improvement upon the premises described and that said material was furnished and the last material delivered June 16, 1921, and that there was due $454.00 with interest from June 16, 1921," and a lien was claimed therefor.

Appellant answered the petition, denying any con-

tract made between claimant and appellant, as to furnishing any material for said improvement and denied any indebtedness to claimant for any such material.

The testimony showed, without any contradiction, that appellant made the improvement and used the material in question between the dates mentioned. It was further shown that appellant had a written contract with Tiernan Brothers for this work, as follows:

"We propose to furnish material and labor to construct your swimming pool with dimensions 75 ft x 36ft x 5 ft, the wall to be made of 4 inch of brick and 5 inch of Hollow Tile, for the sum of $880.00 Including brick and cement sulshed floor.

We agree to take in Heavy Trucking Wagon for $250.00 to apply on account and also carry a note for $300.00 for three (3) months with six (6%) per cent interest.

Yours truly,

Tiernan Brothers.

Accepted: L. L. Butterfield."

It was shown further by Claude Tiernan, testifying for claimant, that the clause, "Including brick and cement slushed floor," written in lead pencil, was not in the contract when Tiernan signed it for Tiernan Brothers. Appellant says in his testimony,

that this contract was presented to him by George Sprenkle, foreman for Tiernan Brothers, and that appellant's brother was present and called attention to the fact that the contract provided for no floor, and appellant said the floor should be designated, and Sprenkle, the foreman, wrote in the clause with a lead pencil. Sprenkle while a witness was asked by neither side as to his authority to write this clause in the contract.

Appellant testified that in the last week in May, 1921, he did have a talk with appellee as to brick for the construction of the swimming pool; that appellee named a price of $17.50 per thousand and appellant stated he would not give that price; that appellee stated he would make a price of $16.00 and appellant testified he did not state to claimant that he would take the

brick, but said if he did take them he would want ninety days time or longer. Claude Tiernan testified that in his negotiations with appellant, appellant told him he could get the brick from claimant at $16.00 per thousand and Tiernan told appellant: "Very well, that is the price I will figure on your job and will hold you good for that price, $16.00 per thousand." Appellant corroborates Tiernan in this statement.

George Sprenkle was present when appellant and Tiernan were talking about this work prior to making the written contract, and Sprenkle testified that, "Butterfield told Tiernan he didn't need to worry about the brick; that he could buy the brick cheaper himself than Tiernan could; he said he had talked with King about the brick, what kind he wanted and **so on."**

Appellant is the uncle of claimant's wife and prior to any talk with claimant, appellant had been to Colchester and examined claimant's brick. There is direct contradiction in this case as

to whether appellant directly purchased the brick from claimant and also a direct contradiction as to whether appellant personally ordered brick to be forwarded or gave direction to others to order brick sent forward to the improvement. It would serve no useful purpose to go into this question and in our judgment is not necessary to a decision of the case. Appellant presents a letter under date of October 4, 1921, written by claimant to appellant, showing that the account for brick and tile was charged to C. Tiernan. Appellant was at the improvement practically every day from June 2d to 16th, 1921, and knew that the brick of claimant were being used upon the work.

One load of one thousand brick was sent by claimant appellee, and appellant objected to the same as being too soft for use in the pool, and by appellant's direction this load was sent to appellant's dwelling house in Macomb and were used for another purpose and later appellant gave appellee a check for $16.00 to pay for this load of brick. Claude Tiernan, on the trial, presented a statement of his account with appellant for constructing this improvement, as said account stood on Septem-

ber 5, 1921, as follows:

Sept. 5, 1921.

Mr. L. L. Butterfield.

To Tiernan Bros.

				Dr.
June 2	Contract amount			$880.00
	Extra floor			30.00
	Asphalt			53.00
				$963.90
	Wagon		$250.00	
	90 da. note 6%		300.00	
July 2	Cash		50.00	
9	"		100.00	
25	"		25.00	$725.00
	Past due			238.90

Due.

90 da. note for $300.00 with interest 6%

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Tiernan also testified on the trial that the only payments he had received for the work, were, the wagon, $250.00, and three checks amounting in the total to $125.00. This, under the statement shown, would leave a balance due Tiernan Bros. from appellant, of $538.90. Appellant's only reply to this is: "There is a controversy between Tiernan Bros. and myself in reference to payment to them under the contract; they claim I owe them money under the contract. I claim I owe them nothing, but they owe me on account of faulty construction of the swimming pool and that is the way it stand."

The $300.00 note given for ninety days has not been paid. There was some evidence adduced tending to show that Tiernan stated that he would be satisfied to get enough out of the claim to pay appellee's claim for the brick, or to have it paid. Tiernan Bros. paid for tile purchased of appellee and for other material used. except the brick furnished by appellee. It is evident that the controversy in this case, as to appellee, has arisen over the lead pencil writing, placed by Sprenkle, in the contract between appellant and Tiernan Brothers, after Tiernan Brothers had signed the contract, and as to which one of the contracting parties was to furnisn

the brick for the floor. It makes no difference whether appellant personally purchased or ordered the brick. It was material necessary in the construction of the improvement, and whether appellant purchased the brick, or the contractors, Tiernan Brothers, purchased or ordered the same, they were furnished to appellant upon his own order or solicitation or upon the order or request of appellant's authorized agent, and under the statute appellee is entitled to a lien. If appellant

had a controversy with Tiernan Brothers or any other person, over this improvement, or the payment for the same, it was his duty to make such persons parties to this petition by cross bill and have them brought into this case and to have all and every controversey, as to this improvement, adjusted in this proceeding. Section 11 Mechanic's Lien Act; **Williams v. Chapman,** 17 Ill. 423 **Cyc,** Vol. 27, page 345; **Lake Shore & M. C. Ry. Co. v. McMillian,** 84 Ill. 208.

The statement of claim for lien filed with the clerk of the Circuit Court of McDonough County on October 15, 1921, and the petition in this cause, grounds a lien in favor of appellee and against appellant, under Section One of the Mechanic's Lien Act, which provides: "Any person who shall by any contract or contracts, express or implied, * * * with the owner, * * * or with one whom such owner **has authorized or knowingly permitted to contract for the improvement of or to improve the same,"** etc.

The words, **"with one whom such owner has knowingly permitted** to contract," etc., have been defined and construed in, **McRae v. The Murdoch Campbell Co.,** 94 Ill. App. 105; **Wertz v. Mulloy,** 144 Ill. App. 329; **Granite City Lime & Cement Co. v. Pitzman,** 161 Ill. App. 228; **Loeff v. Meyer,** 209 Ill. App. 388; **Loeff v. Meyer,** 284 Ill. 114, and 4 American Law Reports, (note) page 694.

In Loeff v. Meyer, 284 Ill. at page 116, the Court say:

"She had no such notice but she had actual notice of the making of the improvements. She was at the building and saw them in progress within three or four days of the beginning of them. She did not object to

the improvement, but knowing that it had been begun without notice to her she permitted it to proceed without objection. She was entitled to the notice provided

in the lease, but she might waive that notice, and by making no objection she knowingly permitted the improvement to be made."

If it may be conceded that Tiernan Brothers were contractors and agreed to furnish the brick, then appellant is liable, at the time of filing said notice with the clerk of the Circuit Court, to the extent of all unpaid amounts upon the Tiernan contract. Even if Tiernan Brothers did not furnish said brick, and did not agree to furnish the brick, then appellant is liable, if he, appellant, stood by and permitted appellee to furnish the brick that went into said improvement and made no objection thereto, under the construction that has been given to Section One of the Mechanic's Lien Act. The issues tried in the Court below, as to who, specifically, ordered the brick, and as to whether the agreement to furnish the brick for the floor of said pool, was or was not a part of the Tiernan Brothers contract, were, each of them, moot questions, and under the issues made, had no bearing upon this case,

The testimony of the witnesses was heard by the Master in Chancery, who made his report and findings of fact and conclusions of law, all of which have been approved and confirmed by the Chancellor, and we find no error in the record.

The decree of the Circuit Counrt of McDonough County is affirmed.

Affirmed.

General No. 7597. Agenda No. 35.

April Term A. D. 1923

Sarah F. Gauble, Appellee,

vs.

Louis Johnson, Appellant.

Appeal from the Circuit Court of Christian County.

SHURTLEFF, J.

This cause comes to this Court upon appeal from the judgment of the Circuit Court of Christian County and is prosecuted by appellant Louis Johnson. The suit was originally brought by appellee, before a Justice of the Peace, for the recovery of the value of seventy bushels of wheat claimed by her, the price of which was agreed to be $1.04 per bushel.

Appellee is the owner of some land near Morrisonville which she had leased to one Pearson for the year beginning March 1, 1921. During the summer of 1921 and while a tenant on appellee's land Pearson filed his petition in bankruptcy. A Trustee's public sale was had of his effects. Among the things sold was Pearson's interest as tenant in the growing wheat on appellee's farm This wheat, the tenant's share only, was purchased by Louis Johnson, the appellant.

Later in the summer, prior to threshing time, appellee entered into a lease with one Robert Brown, one of her witnesses, and leased to him the same farm for one year beginning March 1, 1922, and permitted him to enter the premises and plow a portion

of the land for the purpose of sowing wheat that fall.

After the making of the Brown lease, the wheat on appellee's farm was threshed. Appellee selected Fred Wernsing to act as her agent at the machine to divide the wheat between her and appellant and deliver it in market. This he did by loads—directing one to the Farmers Elevator at Morrisonville for appellee and the alternate one to the C. E. Company Elevator for appellant. The last load directed to the Farmers Elevator, however, because of an impending storm, was diverted to appellant's elevator. It is the undisputed testimony

that the division at the machine was not to determine the respective shares of the parties, but the weights wer to be taken as registered at the two elevators and settlement between appellant and appellee effected from those weights.

During the course of the threshing, Brown, the tenant of appellee, appeared at the machine and requested from Wernsing some wheat to be used in seeding the land of appellee the following fall. Brown says that he saw appellant and appellant told him to go get the wheat. In direct conflict with this statement by Brown is appellant's testimony and also the schedule filed by Brown thereafter, as a bankrupt, in which he listed as one of his liabilities the value of seventy bushels of wheat, and appellee as his creditor for this wheat.

Wernsing testified that he talked with appellant a week or ten days before the threshing and told him that appellee had employed him to divide the grain, for her, with appellant, at the threshing, and appellant was satisfied with such arrangement and agreed that the wheat should be divided at the scales, and said that Brown would get seventy bushels and it would be weighed at Beatty's.

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Soon after the grain was threshed, appellant and Clifford Gauble, son of appellee, who was cashier of the First National Bank of Morrisonville, met and had a purported settlement. Appellant testified it was a settlement of the whole matter and produced two sheets, with figures purporting to cover the whole matter. The sheets contain figures of loads and weights of grain delivered at each elevator and cover the seventy bushels of wheat taken by Brown. The sheets cover the expense of threshing, amounting to about $179.35, which, under the terms of the lease, was to be paid one-half by each party. On sheet "3" are the figures, "bal. due 21.76" and there is no dispute but that Clifford Gauble gave appellant a check for this amount. We are not able to reconcile all of these figures and they are not fully explained in the evidence, a stipulation having been entered into as to the amount of grain and value; but the purported settlement, by the payment of the

check to appellant, did divide the expense of threshing and deducted the seventy bushels of wheat, taken by Brown out of appellee's one-half of the grain. Appellant insisted that this was a full settlement of the whole matter and that the 70 bushels of wheat taken by Brown was fully understood and agreed to by Gauble, and that no complaint was made about it until after Brown filed his petition in bankruptcy and scheduled the seed wheat indebtedness as appellee's claim. Clifford Gauble testified to the settlement but said the matter of Brown's 70 bushels of wheat was left unsettled; Wernsing had given Gauble the figures on the division, but said the Brown wheat was to come out of appellant's one-half and that he settled the whole matter except as to the Brown wheat.

It is evident that the witness Brown has been the trouble maker of this case. He testified that two weeks before the threshing, he bought 70 bushels of seed wheat from appellant to sow upon appellee's farm, and later in bankruptcy schedules the debt as held by appellee.

B. A. Kent was a witness for appellant and hauled wheat from the machine at this threshing. Wernsing asked Kent if he knew anything about Brown getting some wheat from appellant and Kent said he would inquire on his trip in and report back, and Kent testified that on his return he told Wernsing that Johnson said: "If Brown was getting wheat from the machine he was not getting any of his part, so let him have all the wheat, as far as he was concerned." Brown was on the ground and had not taken any wheat at that time.

Wernsing admits talking with Kent about this matter and did not deny but that something of that kind was said. Brown testified that after the threshing he went to appellant to pay for the wheat and that appellant told him he had turned the matter over to appellee and refused to take the money. This appellant denies.

There is no testimony in the record to show that Brown purchased wheat of either party, except his own evidence. On the trial it was a disputed question whether appellant or appellee's agent Wernsing, was

responsible for Brown taking the wheat and it was further disputed whether the settlement between appellant and appellee's son, covered the matter of this wheat. Appellant stood in the position of appellee's tenant, Pearson, a bankrupt, and was required to carry out the terms of Pearson's lease which required appellant to deliver one-half of all the grain raised on

the farm, in the market at Morrisonville, the appellee to pay one-half of the expense of threshing. **Collier on Bankruptcy,** 1162; **Planters Oil Co. v. Gresham,** 202 Southwestern, 145.

Over the expense of threshing there was no disagreement. In the state of the proof, it was requisite that the jury be accurately instructed as to the law. The appellant complains of instruction number three, given for appellee as follows:

The Court instructs the jury that under the evidence in this case the plaintiff Mrs. Gauble had leased the farm to Pearson and that the lease was sold under a proceeding in bankruptcy and purchased by the defendant Johnson, and that by said purchase Johnson became the tenant of Mrs. Gauble and required under the terms of the lease to pay the rent by delivering her one-half the wheat in question, and if you find from a preponderance of the evidence that he has failed to do this and that the wheat in question was Mrs. Gauble's for rent and that the same has been taken by Johnson, or under his direction, then you should find the issues for the plaintiff and assess her damages at $72.80.

This instruction purports to recite all of the facts necessary for appellee to prove, to be entitled to a verdict, and directs a verdict. This was error, as it ignores entirely the defense of settlement claimed by appellant to have been made with Clifford F. Gauble. **Illinois Linen Co. v. Hough,** 91 Ill. 63; **Quinn v. Donovan,** 85 id. 194; **Pardridge v. Cutler,** 168 id. 504; **I. C. R. I. Co. v. Smith,** 208 id. 619; **Lena Lumber Co. v. Hanley,** 214 id. 243; **Montgomery Coal Co. v. Barringer,** 218 id. 336; **Pittman v. C. & E. I. R. R. Co.** 231 id. 587; **Ratner v. Chicago City Ry. Co.** 233 id. 172; **Chicago City Ry. Co. v. Shreve,** 226 id. 539.

In **Pardridge v. Cutler, supra,** the Court said, page 512: "If the jury found these facts, they were told that the law presumed that the transaction would be in accordance with the rules and regulations and the defendant must pay," and again, page 513:

"There were other instructions, given at the request of defendant, stating different rules, but they were simply contradictory of this one, and it was left to the jury to choose which one they pleased as their guide. Here was an instruction substantially directing a verdict regardless of defenses which there was evidence fairly tending to prove, and the error in such an instruction is not obviated by giving conflicting instructions."

In **I. C. R. R. Co. v. Smith, supra,** at page 619, quoting **Pardridge v. Cutler, supra,** the Court say:

"The law applicable to different questions may be stated in separate instructions, and the entire law applicable to all the questions involved in a case need not be stated in each. In such case the instructions supplement each other, and if they present the law fairly when viewed as a series, it will be sufficient. But if an instruction directs a verdict for either party, or amounts to such a direction in case the jury shall find certain facts, it must necessarily contain all the facts which will authorize the verdict directed."

We have examined all the cases cited by appellee, but they do not apply to the instruction given in this case.

Appellant complains of appellee's fourth instruction, as follows:

"The Court instructs the jury that as to the settlement claimed by the defendant in this suit, the burden of proving a settlement

is upon the defendant, and even though you may believe from the evidence that they figured upon the amount of the wheat and a check was paid representing the difference coming from Mrs. Gauble to Johnson, still if you believe from the evidence there was at that time any matter in dispute and that there was not an adjustment of all existing matters, this would not constitute a full settlement. It devolves upon the

defendant to prove by a preponderance of the evidence that all items existing between the plaintiff and defendant was taken into consideration and a balance struck and a payment made, to be in full of the difference existing between them and unless the evidence so shows you should find the issues for the plaintiff."

This instruction does not state the law correctly and was misleading to the jury in this case. If it is conceded that there was a settlement between appellant and appellee in regard to the matter, upon which the instruction is based, then a presumption arises that the settlement embraced all matters of difference growing out of this transaction and this presumption is so strong, that it devolves upon the party asserting the contrary to prove that an item ommitted was not due, or that it was omitted by the consent of the parties, or by accident or unintentionally by the party claiming it. **Straubher v. Mohler,** 80 Ill. 21; **Beebe v. Smith,** 194 Ill. 634; **Cooper v. Cooper,** 164 Ill. App. 523 and **Bull v. Harris,** 31 Ill. 487.

A settlement was had between the parties as to this wheat. The arrangement was that appellee's part was to be delivered in one elevator and appellant's in anotner, and then all the wheat was to be taken into account. Under these circumstances it de-

volved upon plaintiff, appellee, and not upon defendant, appellant, to show by a preponderance of the evidence that the item as to the Brown seed wheat was omitted from this settlement.

An adjustment and settlement of accounts between parties affords evidence that all items properly chargeable at the time were included. This is not conclusive, but it would require clear and convincing proof that sucn items were unintentionally omitted between parties subsequently claiming to recover them. **Bull, Admr. v Harris,** 31, Ill. 487.

We regret the necessity to reverse this judgment. A small amount is involved and the case has been submitted to two juries—once in Justice Court without instruction and once in the Circuit Court, under instructions that should constitute reversible error, unless sub-

stantial justice has been done, and the judgment as viewed from the entire record is right. **Beresh v. Supreme Lodge,** 255 Ill. 122; **McCordel v. Baueser,** 161 Ill. App. 447; **Greenup v. Stoker,** 8 Ill. 202.

From a reading of the entire record, this Court is not prepared to say that, upon a retrial and upon proper instructions, the result would be the same, and therefore feels impelled to reverse and remand the case.

Reversed and Remanded.

General No. 7621 Agenda No. 4

October Term A. D. 1923

People of the State of Illinois, Defendant in Error

vs.

James Butler, Plaintiff in Error

Writ of Error to County Court, Edgar County.

HEARD, P. J.

At the November 1921 term of the Circuit Court of Edgar County plaintiff in error, hereinafter called the defendant, was indicted on a charge of illegally transporting intoxicating liquor. The indictment was certified to the County Court of Edgar County for process and trial. On the 9th day of August, 1922, defendant filed his motion for a change of venue on the ground of the prejudice of the Judge, which motion was supported by his affidavit and the affidavits of Jeoria Buffin and Lucy Elliott. Defendant's affidavit stated that the knowledge of such prejudice did not come to the defendant until the 9th day of August, 1922, on which day the motion coming on to be heard by the court a change of venue was denied. The trial resulted in the conviction of the defendant and he was sentenced to pay a fine of $300 and to be imprisoned for four months in the Edgar County jail and to stand committed until the fine and costs were paid. To review this judgment a writ of error has been sued out from this court.

The only question involved in this case is whether or not the court erred in denying the motion for a change of venue. The affidavits filed by defendant were in conformity with the statute. Just what notice was given to the States Attorney does not appear but the record shows that he was present in court when the motion came up for hearing. In **Clark v. People,** 2 Ill. 117, it is said:

"When by petition verified by affidavit the accused brings himself within the requisitions of the statute the obligation of the Judge or court, to allow it, is imperative, and admits of the exercise of no discretion."

The change of venue should have been granted and the judgment of the County Court is, therefore, reversed and the cause remanded.

General No. 7624 Agenda No. 7

October Term, A. D. 1923

S. Murray Clark, Public Administrator, Appellant

vs.

Merrill Main, Appellee

Appeal from Circuit Court of Vermilion County.

HEARD, P. J.

On the 21st day of September, A. D. 1921, S. Murray Clark, who was the public administrator for the County of Vermilion was by the Probate Court of Vermilion County, Illinois, appointed administrator of the estate of Everett Smith, deceased, on his official bond.

On the 15th day of May, 1922 this action was brought in the Circuit Court of Vermilion County by appellant as such administrator for the benefit of the next kin of said Everett Smith, deceased, for damages alleged to have been sustained by them by reason of the death of said deceased which the declaration alleges was caused by deceased being thrown from an automobile in which he was riding, by reason of the reckless, negligent and unlawful manner in which said automobile was driven by appellee.

To the declaration appellee filed a plea which alleged among others things—

"that the said S. Murray Clark was not at the time of the beginning of this suit on May 15, 1922, Public Administrator in and for the County of Vermilion and State of Illinois; that he is not now Public Administrator in and for said County, and has not

been Public Administrator in or for said County during any time from May 15, 1922, to the present time; that prior to September 21, 1921, said S. Murray Clark was Public Administrator in and for said County of Vermilion; that on said 21st day of September, A. D. 1921, said S. Murray Clark was, as such Public Administrator, by the Probate Court of Ver-

milion County, Illinois, appointed administrator of the estate of said Everett Smith, deceased, on his official bond as such Public Administrator; that there are no papers on file in said Probate Court in said estate except the petition for the appointment of an administrator and the letters of administration issued on said 21st day of September, A. D. 1921, to S. Murray Clark, as such Public Administrator; that there have been no orders or other proceedings of any kind taken in said Probate Court in said estate since September 21, 1921; that no inventory or appraisement bill has ever been filed; that no adjustment term has ever been fixed; that no notice has ever been given of any adjustment term in said estate; that there are no assets whatsoever belonging to said estate of Everett Smith; that no funds or property of any kind ever came into the hands of said S. Murray Clark, as such Public Administrator, or otherwise, belonging to said estate of Everett Smith, deceased; that said S. Murray Clark resigned as Public Administrator in and for said County of Vermilion, State of Illinois, during the month of October, 1921; that Louis J. Bremer was appointed Public Administrator in and for said County of Vermilion, State of Illinois, and gave his bond as such Public Administrator during the month of October A. D. 1921, and has continued to act as such Public Administrator from thence hitherto."

To this plea appellant filed a replication admitting some of the allegations of said plea and denying other and alleging that—

"he has never been discharged of his trust as administrator of the estate of Everett Smith, deceased, by the Probate Court of Vermilion County, Illinois; that Louis J. Bremer, public administrator, has never been appointed administrator of the estate of Everett Smith, deceased, by the Probate Court of Vermilion County; and this plaintiff further says that the estate of Everett Smith, deceased, was not settled at the time of the bringing of this action and has never been

settled. And that this plaintiff is now in the discharge of his duties as the administrator of the estate of Everett Smith, deceased.

This plaintiff further alleges that the estate of Everett Smith, deceased, is in debt in the sum of more than Eight Hundred ($800.00) Dollars, being the cost of his funeral, for undertaker's bill, burial lot and funeral expenses, and that the same remains a claim against the said estate and remain unpaid.

The plaintiff further admits that the said S. Murray Clark resigned as Public Administrator in and for said County of Vermilion, State of Illinois, during the month of October 1921; that Louis J. Bremer was appointed Public Administrator in and for said County of Vermilion and State of Illinois, and gave bond as such Public Administrator and duly qualified as such Public Administrator during the month of October, A. D. 1921, and has continued to act as such Public Administrator from thence hitherto."

Defendant demurred to this replication and the demurrer was sustained by the court. Appellant elected to stand by the replication and judgment was entered against him for costs and that he take nothing by the suit from which judgment an appeal has been taken to this court.

The question involved in this appeal is whether or not appellant had authority to bring the suit and it is claimed by appellee that when S. Murray Clark resigned as public administrator, in October 1921, and his successor was duly appointed and duly qualified, his functions ceased and thereafter he had no authority in law to maintain any suit at law as public administrator.

In **Ramsey v. Van Meter** 300 Ill. 193, it was said:

"His office as Public Administrator ceases, under our statute, the moment his term expires or is terminated and his successor is qualified, and he has no further duties to perform except to complete the administration of estates entered upon my him theretofore, and in which he continues in the same capacity as that of any ordinary administrator."

The demurrer admits the truth of the allegations of the replications that appellant had never been discharged as administrator of the estate of Everett Smith, deceased, by the Probate Court of Vermilion County. He was therefore under the authority cited authorized after the termination of his office as public administrator to settle the estate of Everett Smith, deceased, and to bring this suit.

It follows that the court erred in sutsaining the demurrer to appellant's replication, but should have carried it back and sustained it to appellee's plea.

The judgment of the Circuit Court is reversed and the cause remanded.

General No. 7641 Agenda No. 22

October Term, A. D. 1923

John F. Welch, Appellee

vs.

Charles M. Peirce, Appellant

Appeal from the Circuit Court of McLean County.

HEARD, P. J.

This is an appeal from a judgment for $500 in favor of appellee against appellant to recover commission claimed for services in the exchange of equities in a Madison County farm subject to a mortgage of $55,000 and a Ford County farm subject to a mortgage of $25,000. Appellant interposed a set-off for legal services rendered by him to appellee—and plead payments amounting to $350.

That appellee acted for appellant in the premises and that an agreement for the trade was consummated through his efforts is conceded as it is likewise conceded that appellant performed legal services for appellee, the controversy being as to the amount of compensation each was entitled to receive.

April 8, 1922 appellant gave to appellee a writing as follows:

"In case a deal is made between myself and Irving Polhemus of Peoria, Ill., involving my 290 acre farm, at the edge of Ford County, Illinois, and 568 acres belonging to said Polhemus, near Mitchell, Madison County, Illinois, I hereby agree to pay John F. Welch of Bloomington, Ill., $1000 commission on the said deal, when deeds are exchanged and the difference paid me in cash, and to allow Welch to collect any amount from said Polhemus, he may see fit.

C. M. PEIRCE."

At the time this writing was made appellant was asking a cash difference of from $25,000 to $30,000.

Polhemus refused to pay more than $18,000 and the negotiations were at a dead lock. Appellee and appellant had a conversation in appellant's office on April 15, 1922 with reference to reducing appellant's commission from $1,000 to $500. As to this conversation there is a direct conflict in the testimony, appellee's version of the conversation being that it was agreed that if the parties would close up the deal on that day he, appellee, would reduce his commission to $500 while appellant testifies that:

"Welch said that if we would consider a smaller cash difference he would reduce his commission, and that he would like to make the deal and that if we took the amount in cash difference of $18,000.00 to $20,000.00, he would make it $500 for his commission; that he was getting a commission from the other side. I told him I would see my folks, but I wanted a positive understanding before anything was done as to the commissions, and I called Mr. Sammon, who was in my office, to hear what Mr. Welch said with reference to the commission I was to pay, and I stated that Welch had said he could get $25,000.00 cash difference on the exchange of equity in the two farms, and that I had agreed to give him $1,000.-00 and that Welch was unable to procure that difference and that we were agreeing on a new commission, and that Welch wanted to reduce his commission, if I would agree to consider an exchange for less amount of cash difference and I asked Mr. Welch to state over the proposition that he had made to Mr. Sammon and myself, if we traded on a basis of $18,500.00 cash from Polhemus to us and the use of the Ford County farm for one year. Mr. Welch then stated if the deal is made along the line suggested by Mr. Peirce, Peirce is to pay me $500.00 and I am to get a commission from Polhemus and that I would rather have that than have nothing."

The deal was not closed on that day but was closed at Peoria April 19, 1922.

Appellant testifies that at Peoria on the day the trade was consummated

"Welch in the negotiation said to me that I ought to take the $18,000.00 cash difference and the use of the Ford County farm, and urged me to take it because he had already taken off $500.00 off of his commission, that he was getting a commission from both sides and that I had better close the deal as I had only $500 commission to pay."

This conversation is denied by appellee. If appellant's testimony as to this conversation is true and appellant acted upon it and closed the deal relying upon it then appellee was only entitled to $500 commission even if appellee's version of the conversation of April 15 be true.

These disputed questions of fact were vital questions of fact to be passed upon by the jury and in this state of the record it was important that the jury be accurately instructed.

At the instance of appellee the court gave to the jury the following instructions:

"The Court instructs the jury that if you believe from the evidence after defendant signed the writing sued upon in this case in which he promised to pay to the Plaintiff the sum of One Thousand Dollars upon consummation of deal between the Defendant and Irving Polhemus, for exchange of farm lands and the payment of the cash difference to the Defendant; the Plaintiff did tell the Defendant, on a day some days prior to the time when the Defendant and said Polhemus did actually sign contract for said exchange, that if the parties would close up their deal on that day, he the Plaintiff, would reduce his commission to Five Hundred Dollars; and if you further believe from the evidence that Defendant and said Polhemus did not close their deal

on that day and that the Plaintiff, about ten days thereafter got the said Defendant and said Polhemus to again come together in Peoria and to sign up a contract for the exchange of their said lands, then, in law, the written contract or promise of the Defendant offered in evidence herein would govern on that branch of the case."

This instruction entirely ignores appellant's testimony as to the conversation had at Peoria April 19, which if true would govern on that branch of the case instead of the writing mentioned in the instructions.

An instruction which substantially directs the jury to return a verdict for the plaintiff in case they find the facts therein stated to be true, must contain all the facts which will authorize the verdict and must not ignore a defense with reference to which the defendant has produced some evidence—(Mooney v. City of Chicago 239 Ill. 414; People v. Durand 307 Ill. 611.)

For the error in giving this instruction the judgment of the Circuit Court is reversed and the cause remanded.

General No. 7653 Agenda No. 34

October Term A. D. 1923

William M. McCrotty, Appellee

vs.

Baltimore & Ohio Southwestern Railroad Co., Appellant

Appeal from Sangamon.

HEARD, P. J.

This is an appeal from a judgment for $7500 in favor of appellee against appellant in an action for personal injuries alleged to have been sustained by appellee in a collision between a street car of which he was conductor and a freight train of appellant.

This is the third time this case has been before this court, the first case being McCrotty v. B. & O. S. W. Ry. Co. 223 Ill. App. 390, and the second being case in which opinion filed January 17, 1923, to which former opinion reference is made for a statement of the pleadings and the facts. This case has been submitted to four juries, the verdict of the first having been set aside by the trial court.

Complaint is made of misconduct of counsel, an improper statement of the court, the admission of improper evidence, the action of the court in the giving and refusal of instructions and that the damages are excessive. We cannot say that the record is free from error in some of these respects. Four juries have found in favor of appellee with an increase of damages each time and we do not feel that any good purpose would be subserved by submitting it to another jury.

The judgment is affirmed.

General No. 7556 Agenda No. 3

April Term, A. D. 1923

Noble W. Kearney, Defendant in Error

vs.

James C. Davis, Agent, etc., Plaintiff in Error

Writ of Error to Logan.

NIEHAUS, J.

The defendant in error Noble W. Kearney sued the plaintiff in error James C. Davis, acting agent for the Federal Government in the operation of the Chicago & Alton Railroad, in the circuit court of Logan County, for the recovery of damages for personal injuries suffered by him, while engaged in the service of plaintiff in error, as a section hand. The railroad in question being at the time engaged in interstate commerce, the right of recovery is based on the provisions of the 'Federal Employers Liability Act.' The defendant in error was injured on the 30th day of January, 1920, near the city of Atlanta; while engaged under the direction of plaintiff in error's foreman, in repairing the railroad track. The injury occurred while he was helping in the work of removing some steel rails from the track, which had expanded and warped by heat, and were wedged together on the track. He was in the act of striking the wedged rail with a heavy maul, at a place where the rail had cracked, for the purpose of breaking it at that point, and thereby releasing the pressure, so it could be removed and replaced by a new rail. He testified, that when he struck the last blow which caused the rail to break "it raised up and the hammer went off, and caused me to stumble * * * and I stumbled with my right foot over the rail, and the rail came out and caught my foot—struck my foot below the ankle." The injury which defendant in error suffered necessitated an amputation of the foot and ankle. A trial of the case resulted in a verdict by the jury, and judgment thereon, for $2500.00 against the plaintiff in error. A writ of error is now prosecuted from the judgment.

The plaintiff in error contends, that the defendant in error by his employment assumed the risks usually and ordinarily incident to his employment; and that the injury in question came within that rule. The evidence however, tends to show, and the jury were fully warranted in reaching the conclusion, that the conditions under which the repair work in question was done, were very unusual; and that the work of repair was unusual; and done under the direction of the foreman of the plaintiff in error: and that the way in which the foreman directed the work to be done, was more burdensome and involved more danger of injury to the employes; and that the act of the defendant in error in striking the rail at the time of the injury was done in obedience of the direct command or direction of the foreman. Under these circumstances, the general rule of assumption of risk did not apply. Chespeake & Ohio Ry. Co. v. Proffitt 241 U. S. 462; Bassham v. Chicago I. & L. Ry. Co. 214 Ill. App. 74; Waiswilo v. Ill. Cen. R. R. Co. 220 Ill. App. 119. It is also contended, that the proximate cause of the injury to the defendant in error was not the alleged negligence of the plaintiff in error, but was occasioned by the accidental stumbling of the defendant in error, which could not have been foreseen. While it may be true, that the stumbling of defendant in error had something to do with getting his ankle and foot in the particular place where the rail caught it, it is also apparent from the evidence, that the stumbling was but a natural incidental consequence of the work of swinging and the striking of the maul on the warped rail; and that the striking of the rail broke it, and caused it to move in such a way as to cause the injury to defendant in error. "Where an injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it were the sole cause. The negligent act or omission must be one of the essential causes producing the injury, but need not be the sole cause, nor the last or nearest cause." Fisher v. C. R. I. & P. R. R. Co 290 Ill 49. We find no reversible error in the record and judgment is therefore affirmed.

General No. 7588 Agenda No. 57

April Term, A. D. 1923

Julius H. Adkinson, Appellee

vs.

Henry A. Dirksen, and Anthony Dirksen, Partners, Doing business as Dirksen Candy Co., Appellants

Appeal from Sangamon.

NIEHAUS, J.

This is an appeal from a judgment recovered in the circuit court of Sangamon County against Henry A. Dirksen and Anthony Dirksen as partners, by the appellee Julius H. Adkinson, in the sum of $900.00 for damages alleged to have been sustained by the appellee for personal injuries suffered by him on or about the 7th day of November 1917 in the city of Springfield, when the motor truck of the appellant collided with a service car in which the appellee was riding, near the intersection of Lawrence Avenue and South 8th Street. The declaration alleges that the collision occurred on account of careless and improper management in the driving of the motor truck, and that the car in which the appellee was riding was operated with due care and diligence. The trial of the case resulted in a verdict for the appellee, assessing his damages at the amount stated in the judgment. Several reasons are urged by the appellant for reversal of the judgment. It is argued that the court erred in overruling appellant's motion to direct a verdict for appellants, made at the close of all the evidence. The ruling of the court on this motion was not erroneous, because there was sufficient evidence adduced on the trial to warrant the jury's verdict for the appellee. The question of whether the negligence charged in the declaration had been proven, and whether there was evidence to show, that the appellee or the driver of the car in which appellee was riding was in the exercise of due care, were questions for the jury, and they determined these questions of fact

against appellants. We would not be justified in saying that the jury were not warranted in reaching the conclusions which they did; nor that the verdict in that respect is manifestly against the weight of the evidence. Complaint is also made because the court refused to give Instruction No. 1 for the appellants. The refusal to give the instruction was not error, inasmuch as the point presented by the instruction was embodied in other instructions which were given for the appellants. Moreover appellant's instructions given to the jury in their behalf fully covered all matters of law, to which they were entitled. The point raised concerning the newly discovered evidence is not well taken. It is apparent there was a lack of diligence in obtaining the newly discovered evidence; no good reason appears, why by the exercise of proper diligence the testimony referred to should not have been ascertained and adduced at the trial, either by producing the witness or in the form of a deposition. Moreover the evidence would have been cumulative merely.

The record does not disclose any reversible error and the judgment is therefore affirmed.

Judgment affirmed.

General No. 7607 Agenda No. 42

April Term, A. D. 1923

Henry Zoller, Defendant in Error

vs.

James C. Davis, Agent for Litigation, etc.,

Plaintiff in Error

Writ of Error to Logan.

NIEHAUS, J.

Henry Zoller, defendant in error, brought this action in the circuit court of Logan County, against John Barton Payne, Director General, etc., operating the Chicago & Alton Railroad, to recover damages for alleged injuries to crops growing on land which he was farming as tenant, and which was overflowed by surface water in 1919. It is claimed, that the water which overflowed the land, had been diverted from its natural course by the Chicago & Alton Railroad, and the City of Atlanta, so as to run over and upon the land mentioned.

The declaration alleges "that the surface waters of the City of Atlanta did not naturally flow upon the land of complainant; that the C. & A. R. R. Co., operated a railroad across certain lands and that in addition to its rights of way upon which it operated its railroad, the defendant, C. & A. R. R. Co., also had a right of user and controls and is and has been, since prior to 1914, in possession of a certain other strip of land; that said C. & A. R. R. Co., has made a ditch along said strip of land; that * * * said railroad and said City of Atlanta entered into an agreement whereby the surface waters from the City of Atlanta were drained through said ditch and that said City of Atlanta caused an open ditch to be constructed connecting with said ditch along said strip of land; that since said time said surface waters from said City have been diverted through said ditch built by said city into and upon said strip of land owned by the C. & A. R. R. Co., and in and along said strip of land to Kickapoo Creek and that a diversion of waters was there-

by accomplished."

After issue joined, there was a trial by jury, which resulted in a verdict and judgment for $733.50 against the plaintiff in error, the City of Atlanta having been found not guilty. The main question at issue on the trial, and presented for review on error, is whether or not the Director General, was actually in operation and control of the property constituting the strip of ground, upon which it is alleged, the diversion of the waters took place. It appears from the evidence, that in 1913, the Chicago & Alton Railroad Company contemplated the building of a new way into, and through the City of Atlanta, for the purpose of avoiding a heavy grade incident to its right of way. In order to carry out the project, it acquired the strip of ground in question, which constituted the right of way of the Lawnsdale & Atlanta Railroad, between Lawnsdale and Atlanta; and which intersected the right of way of the Chicago and Alton at Atlanta and Lawnsdale. The City of Atlanta, in order to facilitate the project, passed an ordinance, giving the plaintiff in error the right to lower its tracks through the city; and the ordinance also provided for, and authorized, cuts and excavations in the contemplated right of way, and intercepting sewers in connection therewith, to take care of surface waters, which would be concentrated artificially because of the changes to be made in the surface of the ground; and for the excavations and fills and embankments resulting from the improvement. And an agreement was made by the Chicago & Alton Railroad Company with the City of Atlanta in accepting the ordinance referred to; and some of the work contemplated by the railroad company had been done; but the evidence does not show, that the work was, ever completed; nor that the strip of ground had become a part of the right of way in use, in the operation of the railroad at the time the Director General took over its control for the purposes of the Federal Government under the Act of Congress and the proclamation of the President. It is

well settled, that the assumption of federal control was "limited to transportation systems, and to property which was used for transportation purposes, including therein, all property fairly incidental or necessary for use in effecting such purposes." U. S. Railroad Administration v. Burch 254 Fed. Rep. 140. The evidence tends to show, that the strip of ground in question, at the time the Director General took possession of the Chicago & Alton Railroad, was not in use as a part of the transportation system of the railroad taken over; and that it was not incidentally a part of such system of transportation; nor does it appear it was necessary for such purpose. No legal inference can be drawn in that state of the record that the Director General took possession and control of the strip of ground, to carry out the purposes of the Federal Government. In the absence of proof in the record, that he did actually take possession, or assume control of the strip of ground in question, the defendant in error had no right of recovery against the plaintiff in error. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

General No. 7532 Agenda No. 22

October Term A. D. 1923

Wesley Prevette, Appellee

vs.

Emerson M. Brewer, Appellant

Appeal from the Circuit Court of Champaign.

SHURTLEFF, J.

Appellee instituted this suit to recover for personal injuries received in a collision with appellant's motor car on December 9, 1920, on the paved highway about two miles east of Urbana, at about 4:30 in the afternoon. Appellee was riding a bicycle, going east about eighteen inches north of the south side of the brick paving, traveling at a rate of six miles per hour. Appellant was driving his car west on the pavement, and in the center of the paved road, as he testifies, going toward his home in Urbana, traveling at a rate of about fifteen miles per hour. The pavement was nine feet in width, with a shoulder of concrete for curb of six inches, on either side, making a pavement ten feet in width. Appellee testifies that appellant was on the south side of the pavement, with the south wheels of his car off of the pavement, and on the dirt road. It had been raining and the pavement was slippery, and the evening wet and "misty." At the point of the collision appellee states that there was mud on either side of the pavement; that he was carrying a dinner pail and a package in his arms and managing the handlebars of his bicycle with both hands. At the place of

injury and along this road the tracks of the Interurban Railway parallel the paving and are at the side and twelve feet south of the paved road. Appellee saw an Interurban car, first, about forty rods east of him, and when he last saw it, it was slowing down for the "Poor Farm" stop, about six rods east of him, the point where the injury occurred. The conductor on the

Interurban states that it was "raining, misty and foggy." Appellant testifies, "It had been raining and was sprinkling and misty." Appellee states that when he first saw appellant's car it was four or five rods east of him and traveling very rapidly, and that it continued this direct course to the west, towards appellee; that when he saw that appellant's car was about to hit him or coming towards him and was close, he turned the handlebars of his bicycle to the north and that the south fender of the car struck him, all of which, from the time he first saw appellant's car until he was struck, would not be over three seconds.

This accident occurred nearly in front of the "Poor Farm." The witness Roney testified for appellee that appellant stated to him that his tire blew out and he lost control of his machine, or partially lost control, and in attempting to regain control of the machine he swerved to the south side of the road and that he saw appellee, but it was too late to enable him to stop the car or avoid hitting appellee.

Appellant's version of the injury is that he was traveling west on this highway and crossed the Interurban tracks at Brady's ahead of the car; that afterwards he passed a mule team which had obstructed his view, and that, after passing this team, his car was in the center of the pavement, the south wheels being about

two and one-half feet north of the south line of the pavement; that he had no chains on the tires; that he was traveling about fifteen miles per hour; that he passed the mule team three-quarters of a mile west of Brady's and then saw appellee on his bicycle about eighteen inches north of the south line of the pavement; that he continued his rate of speed to a point about sixty feet east of appellee; then he began slowing his engine a little or slackening his speed; when about thirty feet from appellee and his car,

going at a rate of twelve to fifteen miles per hour, the left rear tire on his automobile blew out. This caused his car to skid and the rear wheels to slide to the north about two feet, and the front wheels to slide or skid to the south an equal distance, so that the car was on an angle northeast and facing southwest, as much as would be caused by a skid or slide of two feet; that he did not try to stop his car, but, at once, with the steering gear, turned the car to the northwest. Appellant states that he was watching appellee all the time, except when he was moving the steering gear, to bring the car from a direction facing southwesterly to a northwesterly course, to avoid striking appellee. Appellant further states that when he had brought his car to a direction facing northwesterly, he saw appellee crossing the pavement in a northeasterly direction and right in front of his car, whereupon appellant attempted to, and did, bring the front of his car to a direction facing southwesterly or west, but too late to avoid striking appellee. Appellant at no time applied his brakes, for the reason, as he states, "to apply the brakes suddenly on an automobile was bad driving and it would naturally cause the car to skid."

Appellant states that the car, after the tire blew out, ran

a little to the south, but that he turned it, when it had gone about five feet; that when he "got his car righted," he then saw Prevette and he was going across the street; that he cut to the northeast and went a distance of six, seven, maybe eight feet. "My car traveled fifteen to twenty feet while he was going that distance."

Appellee received a serious injury. The bone of the limb was broken and protruded through the clothing. He was taken to a hospital and attended by various physicians. One limb is now one and a half to two inches shorter than the other, and at the time of the trial was not fully healed. By reason of the injury appellee, after

coming out of the hospital, was on crutches for a number of months and can now walk but a short distance without a cane. Since the injury he has not been able to do any work except for a little time, not over an hour or so, around his home. Appellee before the accident weighed between 140 and 145 pounds, was a strong, well man, and his limbs of equal length, and was employed as a stationary fireman, under the civil service, in one of the buildings of the State University, at a salary of $135.00 per month, and lived a little over two miles east of Urbana on the paved road; and at the time of his accident was on his way to his home. Appellee has not had any employment since the date of injury and now weighs 130 pounds. From the evidence, appellee is permanently injured.

The declaration contains three counts and one additional count. The first count charges that appellant drove his said automobile at such a high and dangerous rate of speed, to wit, at the rate of fifty miles per hour, and did so carelessly,

negligently and improperly drive and manage said automobile that by and through the negligence of the defendant in that behalf, etc.

The second count is a charge of general negligence. The third count charges that the said defendant did drive said automobile at a rate of speed greater than was then and there reasonable and proper, having regard to the traffic and use of the way, and so as to endanger the life or limb of others, and that by and through the negligence of the defendant in that behalf in the premises as above stated, said automobile was then and there carelessly, negligently and improperly driven with great force and violence against, upon and over the body of him (the plaintiff), etc.

The additional count is substantially a charge of general negligence against the defendant. All of said counts

alleged that plaintiff was in the exercise of due care and caution for his own safety, etc.

There was a trial by jury, a verdict for the appellee in the sum of $8,000.00, a motion for a new trial, which the court below overruled, and entered judgment upon the verdict, and the appellant brings the case to this Court for review.

The evidence in this case was conflicting, both as to due care on the part of the plaintiff and negligence on the part of the defendant. Due care and caution on the part of plaintiff, appellee, may or may not have required him to turn to the right sooner than he did attempt to extricate himself, from the peril in which he was placed, by turning to the left, and due care on the part of appellant may or may not have required him to turn to the right or upon the blowing out of the tire, stopped his car.

Appellant contends that the third count of the declaration

did not state a cause of action, and that appellee's third and fourth instructions, based thereon, were error ,and that appellee's seventh and tenth instructions were erroneous—"in informing the jury that a speed of less than thirty miles an hour was unlawful."

The third count, in charging negligence, stated that appellant "drove his automobile at a speed greater than was then and there reasonable and proper, having regard to the traffic and use of the way, and so as to endanger the life and limb of others," and "that by and through the negligence of the defendant in that behalf in the premises above stated, said automobile was then and there carelessly, negligently and improperly driven," etc. Appellant cites **People v. Beak,** 291 Ill. 452 and **Fippenger v. Gloss,** 190 Ill. App. 239.

In the Beak case, the Court merely held against the contention of appellant, in that case, that the Motor Vehicle Act was unconstitutional, and in the Fippenger case

the Court held that an allegation of speed, under a **videlicet** merely, did not warrant an instruction that a speed of twenty miles per hour was greater than was reasonable and proper. The language of the pleading is to be taken most strongly against the pleader, and in so construing the third count, the only charge of negligence therein is the language quoted from Section 22, Motor Vehicle Act (1919).

Appellant's contention is that any charge of excessive speed does not charge negligence unless the rate of speed charged is **prima facie** evidence of an unlawful speed under Section 22 of the Motor Vehicle Act of 1919, and that the rates of speed fixed in said section as **prima facie** evidence of unlawfulness are maximum

rates of lawful speed. Section 22 provides: "No person shall drive a vehicle of the first division, as described in section 2 of this act, upon any public highway in this state at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or injure the property of any person." This clause is independent and separated from the remainder of said section, which follows, fixing various rates of speeds under varying circumstances, as constituting **prima facie** evidence of an unlawful speed, as above described. Appellee contends that such rates of speed, described in the section, are merely to fix a rule of evidence, to show **prima facie** that such rate of speed, unless shown to the contrary, violated the act.

Appellant in his contention overlooks Section 42 of the Motor Vehicle Act (1919), which is a saving clause as to civil suits and, in the opinion of this Court, includes a possibly new statutory definition of negligence. It provides that nothing in the act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages, by reason of injuries to per-

son or property resulting from the negligent use of the highways, etc. * * * "And in any action brought to recover for injury either to person or property **caused by running any motor vehicle at a rate of speed greater than is reasonable and proper, having regard for the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person,** the plaintiff shall be deemed to have made out a **prima facie** case by showing the fact of such injury and that the person driving such motor vehicle was at the time of such injury **running the same**

at a speed greater than was reasonable and proper, having regard for the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person."

These sections have been passed on by our courts and do not support appellant's contention (**People v. Lloyd,** 178 Ill. App. 66; **Gordon v. Stodelman,** 202 Ill. App. 255; **Hartje v. Moxley,** 235 Ill. 164). If there had been any question about the sufficiency of the allegations in the third count, prior to that time, the passage of the Motor Vehicle Act in 1907 rendered the charge in the third count and the act described in the first part of Section 22, Act of 1919, an act constituting negligence as provided in section 42 of the same revision. Sections 10 and 18 of the Act of 1907 contained substantially the provisions now contained in Sections 22 and 42 of the Act of 1919. In **Hartje v. Moxley, supra,** the Court said (page 166), quoting a part of Section 18 of the Act of 1907; "And in any action brought to recover any damages for injury either to person or property caused by running any motor vehicle at a greater rate of speed than designated in section 10, the plaintiff shall be deemed to have made out a **pima facie** case by showing the fact of such injury, and that such person or persons, driving such motor vehicle, was at the time of such in-

jury running the same at a speed in excess of that mentioned in said section 10, or at an unreasonable rate of speed, as set forth in Clause C of said section. "And the Court said: "The speed permitted by section 10 in that portion of the City of Chicago where the collision occurred cannot, under any circumstances, exceed fifteen miles per hour. In determining the **highest lawful** rate the proviso to subsection C of section 10 must always be given effect."

Subsection C of section 10 then provided: "Provided, however, that nothing in this section contained shall permit any person to drive a motor vehicle at a speed greater than is reasonable, having regard to the traffic and use of highways, or so as to endanger the life or limb or injure the property of any person."

The third count of the declaration, in the opinion of the Court, stated a cause of action. The third, fourth, seventh and tenth instructions, given for appellee under that count and properly covering the questions of proximate cause of injury did not constitute error, and appellant's given instructions 21 and 27, following the same construction of the Motor Vehicle Act, are inconsistent with this assignment of error and appellant cannot, therefore, complain of similar instructions given for appellee.

Appellant complains of appellee's fifth instruction. This instruction informs the jury that while the plaintiff must prove his case by a preponderance of the evidence, still the proof need not be the direct evidence of persons who saw the occurrrence sought to be proven, but facts may also be proven by circumstantial evidence, that is, by proof of circumstances, if any, such as may give rise to the reasonable inference in the minds of the jury of the truth of the facts alleged in the first, second and third counts of the declaration and the additional count, provided such circumstances, **together**

with all the evidence in the case constitute a preponderance of the evidence. Appellant cites **Ohio Bldg. Vault Co. v. Industrial Board,** 277 Ill. 102; **Tuttle v. Beltman Ry. Co.** 145 Ill. App. 50 and **People v. Gasner** 152 Ill. App. 57.

In the cases cited by appellant, the proof was entirely circumstantial, while in the case at bar the proof was direct, as well as circumstantial. The instruction as drawn does not confine the jury to the consideration of circumstantial evidence, but says: "Provided such circumstances together with all the evidence in the case constitute a preponderance of the evidence." This identical instruction was given in **U. S. Brewing Co. v. Stoltenberg,** 211 Ill. 531, and the Court, in commenting upon the same, at page 535, in a case practically identical to the case at bar, holds that there was no error in giving the instruction.

Appellant complains of the ninth and fourteenth instruction given on behalf of appellee. Instruction number nine, which is not a peremptory instruction, "informs the jury that if they believe from a preponderance of the evidence and the instructions of the Court in this case that the plaintiff is entitled to recover"—then instructs the jury as to what facts may be taken into consideration in arriving at the verdict, such as pain, suffering, etc., and that the plaintiff does not have to prove his particular damage in dollars and cents. Instruction number fourteen does not seem to contain the language which appellant criticizes. It is not a peremptory instruction and advising the jury how to arrive at compensation, says: "And you may find for him such sum as in the judgment of the jury, under the evidence and the instructions of the Court in this cause, will be a fair compensation," etc. The point made on instruction number nine in appellant's brief is based upon **Lundon v. The City of Chicago,** 83 Ill. App. 209 and **Granz v. The-**

iben 15 Ill. App. 484. The criticized instruction, in both cases, were peremptory

instructions and while the form was condemned it is not pointed out that the Court in either case reversed the judgment upon that point. In the Cranz case the instruction as given was condemned by the Court and the case reversed for other substantial errors occurring upon the trial. In the Lundon case the Court discussed the giving of the instruction and criticized it, but reversed the case upon the giving of other instructions which the Court said were clearly erroneous.

In **Brennan v. City of Streator,** 168 Ill. App. at page 139, the Court held: "The eighth instruction, on the measure of damages, is objected to on the ground that when it uses the words 'under all the evidence and instructions of the Court in this case,' it thereby authorizes the jury to find the facts from the instructions. This contention we consider unsound. This instruction in substantially these words has been approved in many cases, including **Cicero St. Railway Company v. Brown,** 193 Ill. 274; **National Enameling Co. v. McCorkle,** 219 Ill. 557 and **Donk Bros. Coal Co. v. Thil,** 228 Illl. 233."

The instructions, neither of them being peremptory but merely stating the rule as to the measure of damages, could not have influenced the jury in any manner as to any finding of fact, and, in the opinion of the Court, did not constitute error in this case.

Appellant complains as to rulings upon evidence that the Court permitted the plaintiff to show that Dr. Brewer had passed the Interurban car twice between Brady's crossing and the County Farm, but that the Court refused to let appellant establish on cross examination of the motorman and the conductor that the Interurban car at no place between the three stops which it had made, had

gone at a higher rate of speed than twenty miles per hour. Complaint is also made by appellant that the Court permitted the conductor and the motorman to testify that they had noticed Dr. Brewer's car skid on the pavement about a mile from the scene of the accident. The conductor, H. T. Blair, testified that he saw Dr. Brewer's car skid a little bit between Smith's crossing and Brady's. This would be three-quarters of a mile from the scene of the accident and the motorman Carrington was permitted to testify that he saw the car swerve a little at Brady's crossing. This was a mile from the scene of the accident. Afterwards, when defendant had about concluded his evidence, the Court excluded the testimony of the witness Carrington with regard to the car "swerving a little" when it went over the crossing, but the Court left the evidence of the conductor Blair, that the car skidded a little bit at one time between Smith's and Brady's crossing, stand and be considered by the jury. The motion to exclude this evidence was overruled.

On the trial of the case, the only testimony as to the speed of Dr. Brewer's car was given by the defendant himself and the conductor on the Interurban car, who testified for appellee. It is urged as error that inasmuch as appellant's car and the Interurban car had traveled a considerable distance nearly together, that the rate of speed of the Interurban car would have had some bearing or tended to show to some extent the speed of appellant's car, and we can see no reason for excluding that testimony and not excluding also the testimony of the conductor, Blair, as to the car skidding.

It was shown on the trial of the case that the appellant had

employed different physicians to attend upon appellee and treat him for his injuries, and appellant contends that he had employed the services of all of the physicians who attended upon appellee, and that appel-

lee was not obligated or liable to pay for any of such services. Dr. McKinney was one of the physicians who attended upon appellee and was produced as a witness by appellee. On cross examination Dr. McKinney was asked by whom he was employed to render these services. Again, he was asked who talked with him about attending Wesley Prevette, and again: Q. "You never had any talk with Wesley Prevette about waiting on him, did you?" and other questions were asked by appellant, seeking to elicit information from Dr. McKinney as to his employment and upon whom was the liability for the payment of any services performed in behalf of appellee. To all of these questions the Court sustained an objection on the ground that it was not cross examination, and later the Court took the ruling under advisement and in the middle of defendant's case Dr. McKinney was recalled by the Court for cross examination, and testified that he had rendered services to Mr. Prevette at Dr. Brewer's request; that he was never requested to render services by Wesley Prevette; that he did have a conversation with Dr. Brewer about the performance of the service before the services were rendered. The witness was acked to state what the conversation was, and upon different questions of that purport, objections were made by appellee and sustained by the court, and witness was only permitted to state that he had had a conversation, without being permitted in any manner to give the substance of the conversation.

Appellant asked the Court to give instruction number 5, which was as follows:

"The Court instructs the jury that you have no right to consider any evidence in this case which has been introduced as to the amount of charges made by Dr. McKinney for the services rendered and testified to by him in fixing any damages which you might allow the plaintiff in this case." This instruction was refused. In this, it is the opinion of this Court that it was error and

that appellant should be afforded the widest opportunity to cross examine the witness as to all conversations with either of the parties to this suit touching the question of his employment and as to the liability for the performance of the services.

In the instructions given the jury were not advised that all of the instructions were to be taken and considered as a series and together. There was no instruction given specifically defining what constituted due care and caution on the part of appellee for his own safety.

The defendant offered instruction Number 6, which is as follows: "The Court instructs the jury that the plaintiff can not recover of the defendant in this case under either the first, second or third counts of his declaration, or the additional count later filed thereto, without proof that the plaintiff exercised due care and caution for his own safety; that is, such care as an ordinarily prudent person would have exercised under the same circumstances, and if the proof fails to establish that fact, you can not find for the plaintiff under either of said counts, but your verdict in such case should be not guilty." It is true that in other instructions the jury were advised that the appellee was required to show due care on his part before appellee could recover, but in none of the instructions were the jury advised as

to what constituted such due care and caution on appellee's behalf.

Some criticism is further directed against appellee's instruction Number 6, the same being a separate instruction and in which the jury were advised: "If you further believe from the preponderance of the evidence that such act was negligence on the part of the defenant, as charged in the aforesaid counts of the declaration" without informing the jury what negligence was charged in said counts thereby, in that instruction, leaving the jury to determine of its own accord what con-

stituted negligence.

There were other instructions which properly defined negligence on the part of the defendant, but it is insisted by appellant that the jury, following this instruction, separated from the other instructions, might well conclude from their own opinion whether the act was negligent or not.

The evidence in this case was very close, both on the question of appellee's due care and caution for his own safety, as well as to the negligence of the defendant, and in such case it is the rule that the jury should be properly instructed and the rulings on evidence free from error. Upon a reconsideration of the case, it is the conclusion of this Court that the judgment and verdict of the lower court should be reversed and the cause submitted to another jury.

Reversed and remanded.

General No. 7572 Agenda No. 53

April Term, A. D. 1923

Old Colony Life Insurance Company, Appellee

vs.

Harriet J. Hickman, et al., Appellants

Appeal from the Circuit Court of the County of Sangamon.

SHURTLEFF, J.

This is an appeal from the Sangamon County Circuit Court from a decree upholding appellee's bill of interpleader and dismissing appellant's cross bill for want of equity.

Appellee filed a bill of interpleader, setting out that on May 15, 1895, Richard T. Hickman made application to the Knights of the Globe Mutual Benefit Association for a certificate of membership therein for $3000, and that the same was accepted and a certificate dated May 24, 1895, issued to him, payable to Harriet J. Hickman, his wife; that afterwards said association issued to him a $2000 certificate in exchange for the original certificate; that in 1904 the Cosmopolitan Life Insurance Association took over the membership of the said Knights of the Globe Mutual Benefit Association; that afterwards, pursuant to a contract of re-insurance or merger between said Cosmopolitan Life Insurance Company and appellee, the contracts of said Cosmopolitan Company were taken over and assumed by appellee, said contract of re-insurance being effective September 9, 1909; that on May 25, 1911, appellee issued to said Hickman its policy with a "rider" thereon attached, payable to John A. Neu in the sum of $1500 with interest from October 15,

1904, the balance being payable to said Harriet J. Hickman.

It further appears from the pleadings and master's report, that in 1917 the insured elected to pay premiums, therein provided, quarterly and continued to pay the same until February 25, 1918, but failed to pay the quarterly premium due on that date within the period of

thirty days grace, provided in said policy. It appears that on April 4, 1918, appellee received at its General Office at Chicago the check of John A. Neu, dated March 24, 1918, for $36.44 in an envelope post marked at Springfield, Illinois, April 3, 1918, but appellee refused the check and returned it to Neu and afterwards the insured presented his application for reinstatement to appellee Company, but appellee refused to reinstate him. The insured, Hickman, died January 28, 1921, and satisfactory proofs of death were furnished to appellee. It appears that after the death of Hickman suits were commenced, one by Neu and one by the beneficiary, to recover upon this policy. The appellee filed this bill under the "Paid-up Insurance" and "Non-forfeiture" clauses of the policy, alleging that it, appellee, had in its possession $434.46 of paid-up insurance to be distributed under said contract and calling upon Neu and the beneficiary to contest their claims in this suit. Attached to and a part of the contract of insurance, was a table of policy values, as follows:

"For the years specified the values specified are as follows, as to loan during year, as to others at end of year.

Guaranteed Cash or		Guaranteed Paid-up	Extended Term Insurance		
Year	Loan Value	Insurance	Years	Months	Days
3	$112.00	$188.00	1	7	--
4	180.00	282.00	2	4	--
5	252.00	378.00	2	11	--
6	316.00	466.00	3	5	--
7	382.00	552.00	3	9	--
8	448.00	634.00	4	--	--

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After twenty years the value applicable shall be the reserve less 2½ per cent thereof."

The contract contained the usual, statutory provisions, in effect, after the payment of premiums for the full period of three years as to "Cash or Loan Value,"—"Cash Surrender" value,—"Paid-up Insurance,"—"Extended Insurance,"—"Options,"—"Non-Forfeiture" clauses and "Indebtedness." As to "Paid-up Insurance" the

contract provided: After three full years premiums shall have been paid, provided policy shall then be in force and shall not have been previously endorsed for extended insurance or surrendered for cash, and provided application shall be made to the Company in writing, the Company will, subject to the provisions of this policy under the paragraph headed Indebtedness, endorse upon the policy in full settlement of all claims thereon an agreement for paid-up life insurance to the amount shown for the current policy year in the table of values above without further payment of premium, but otherwise subject to the conditions of this policy.

As to "Extended Insurance" the contract provided: "After three full years premiums shall have been paid, provided policy shall then be in force and paid-up insurance shall not have been substituted therefor, automatically or by endorsement, and provided application shall be made to the Company in writing, the Company will, subject to the provisions of this policy under the paragraph headed Indebtedness, endorse upon the policy in full settlement of all claims thereon, an agreement for paid-up term insurance for the amount of this policy and for the term shown for the current policy year in the table of values above shown without further payment of premiums and without right to loan or cash values subject to the conditions of this policy. If this

privilege be availed of after default, the term of extended insurance shall be reckoned from the first day of the month of grace.

In the "Non-Forfeiture" clause, it was provided that upon failure to pay premiums after the policy had been in force three years, "insured shall nevertheless be entitled to the value of this policy as specified above, subject to the provisions of the paragraph headed Indebtedness, and may have the benefit, as if there had been no default, of the paragraphs above, headed as follows: (a) Loans, (b) Cash Surrender, (c) Paid-up Insurance, (d) Extended Insurance." It was further provided that if

election was not made by the insured within the period of grace, the provision for paid-up insurance shall automatically apply and the appellee shall therafter be liable for paid-up insurance to such an amount as the valuation, on the basis stated under the clause headed "Valuation" will purchase, first charging against such valuation any indebtedness against it.

Under the heading "Options" it was provided that the insured, in exercising options, should do so in writing, the same to be filed with the company and to be joined in by the beneficiary and assignee, if any. The contract provided for the deduction of any indebtedness, secured by the policy, to appellee, including any balance of the current year's premium remaining unpaid, and "In case of paid-up insurance any existing indebtedness shall be deducted from the amount applicable to purchase such paid-up insurance. In the case of extended insurance any existing indebtedness shall be applied to reduce the term of such extension. But no failure to repay any advance or loan, or pay the interest thereon, shall void this policy while the total indebtedness thereon is less than the loan value thereof."

The insured was permitted thirty days grace in the payment of premiums and all of the foregoing provisions were contained in the general printed portions of the policy of insurance.

Attached to the contract, in the form of a "rider," in type-writing, signed by appellee, is a separate agreement providing: "Viz: John A. Neu, creditor of the insured, if living at such time, otherwise to the executors, administrators or assigns of such creditor, out of the amount the Association is then liable to pay on this policy the sum of $1,500.00 which the insured hereby acknowledges to be due and owing to the creditor, together with lawful interest thereon according to the laws of the State of Illinois from October 15, 1904, the date of this policy until paid, and all premiums advanced by the creditor or by his executors, administrators or assigns, on this policy with six per cent annum simple interest thereon

from the date of advancement of such premiums to the date of the payment of the loss under this policy. It is expressly agreed that none of the privileges of cash surrender, surplus or paid-up insurance shall be granted except by the mutual consent in writing of the insured and said creditor, his executors, administrators or assigns, subject to the approval of the Association, nor can a change of beneficiary be made by the insured which would in any way affect the interest of said creditor herein, and the conditions and privileges of this contract are hereby modified in accordance herewith. The balance of the benefits under this policy shall be payable to HARRIET J. HICKMAN, wife of the insured, if living at such time, otherwise to the Executors, Administrators or assigns of the insured.

In the event of the payment of the creditor's claim during the life of the insured with a return of premiums advanced, with interest,

the creditor's interest in this policy shall cease and the whole death benefits shall be payable to the beneficiary of the insured last designated.

By accepting this policy it is agreed by the insured and all persons who have, or who may hereafter acquire any interest in this policy, that this Rider shall be and is attached to this policy at the time of the issuance, and before the delivery thereof, and shall be and is a part of the original contract or policy and shall be read in connection therewith the same as if these provisions and conditions were recited at length in the body of the policy, and is accepted as such by the insured and all persons who have or who may hereafter acquire any interest in this policy."

On the hearing proof was presented by appellants showing that from 1904 to 1917 the premiums, during two-thirds of the time, were not paid promptly when due, and between December, 1909, and December, 1917, the premiums were paid by the insured and accepted by appellee, after the period of grace had expired and at times such deferred payments being made six to ten days after

the expiration of thirty days. In September, 1917, the premium was paid and accepted thirty-four days after due and in December, 1917, thirty-six days after due. No interest charge for deferred payments was ever made and no forfeiture or default claimed. The annual premium on this policy was $137.52, and, under the option, was being paid quarterly at the rate of $36.44 per quarter, the year ending on May 25th of each year and the premium being paid in advance. There is evidence that appellee, in taking over the policies of the Cosmopolitan Company took over a fund of about sixty thousand dollars, accumulated from the premiums paid upon such policies, but the nature and number of such policies are not shown and it

is not made clear just what equity appellant found upon the existence of this fund in appellee's hands.

Appellants answered the interpleader bill and presented, by leave of court, a cross bill, praying for affirmative relief, the payment in full of the policy of insurance, with interest from the date of delivery of proofs of death. The cause was submitted to a master and there was oral testimony taken upon the issue of waiver, but outside of the issue of waiver the issues raised by the pleadings are all legal issues, arising upon a construction of the contract between the parties. There was a finding and decree sustaining appellee's interpleader bill and finding that the appellee should pay into court the sum of $434.46 as paid-up insurance for appellant Neu, and that appellee (Old Colony Company) should pay the costs of the suit. Appellee excepted to that part of the decree, charging it with the costs of suit, but has made no assignment of error; and this question is therefore not properly before this court for review.

Appellee contends that under the contract of re-insurance made between the Cosmopolitan Association and appellee September 9, 1909, to any convertible term policy and other policy issued in succession thereto, by appellee, appellee had the right to attach a lien equal to ten

per cent of one annual term permium per annum for a period not to exceed ten years from the date of the convertible term policy. This agree-

ment to be in lieu of the policy holder taking a new medical examination, and in arriving at the total of paid-up insurance in this case appellee has deducted this lieu indebtedness and other charges provided by law from the gross reserve that is computed upon the policy, namely, $530.50, to arrive at the amount of the paid-up insurance, $434.46. A great many pages in brief and argument are devoted to the legality of this lien indebtedness and likewise much space is devoted to general questions of life insurance and in fact the field of life insurance, from the actuary standpoint, is pretty well covered with cases cited, much of which, in the view we have arrived at, is immaterial to a decision in this case.

It is first contended by appellants that in this case, in which there is a dispute between the parties as to the amount of appellee's indebtedness, a bill of interpleader will not lie, and that the appellants are entited to a common law trial by jury on the issue of waiver in this case. Cases are cited that seem to support appellant's contention, but inasmuch as appellants have answered the bill and by leave of court presented their cross bill, submitting the whole controvesy to a court of equity and issues having been made on both bill and cross bill, and findings and a decree entered, it is now too late for either party to suggest, in a case of this kind, that the court, of their own selection, was without jurisdiction to hear the case.

Appellants next contend that by the course and manner of paying premiums to appellee, usually after the dates they became due and many times after the day of grace, and the same having been accepted by appellee, with no interest charge, and with no suggestion

of default, forfeiture or lapse, that thereby the date of payment or the day of grace, was moved forward by such practice and custom and that appellee was in no

position to declare a default or lapse of said policy, without notice to the insured or Neu. In fact, it appears that the premium due November 25, 1917, was not paid until December 31st following, and the premium due August 25, 1917, was not paid until September 28th following, and periodically through the years at least twice a year the payments had been deferred over the grace date and had been accepted and applied by appellee, without any complaint, so far as this record shows, to the insured or Neu.

It has been held that if the parties of the company and its course of dealings with the insured and others known to the insured, has been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture, as against one in whom their conduct has induced such belief. May on Insurance, sec. 361; **Chicago Life Insurance Co. v. Warner,** 80 Ill. 413; **Aetna Life Ins. Co. v. Sanford** 98 Ill. App. 383; **Balluh v. Peoria Life Association** 159 Ill. App. 230; **Adam v. The Columbian Nat. Life Ins. Co.** 218 Ill. App. 61; **Metropolitan Accident Ass'n. v. Windover** 137 Ill. 417. In the last case cited it was held that: "A forfeiture of this character is a matter of strict legal right and the defendant, in order to assert it, must abide inflexibly by the terms of the contract."

Appellee, at no time until April 4, 1918, abided inflexibly or otherwise by this term or clause of the contract. Appellee presents the fact that in the policy of 1910, to which the "Rider" is attached, in fine print, as the photograph in the record shows,

not in the body of the contract proper but in the midst of display, the words: "Old Colony Life" above and "Insurance Company" beneath, taking up about one-third of a page, and in the center, surrounded by beautiful groves and moving figures, in small pica type is a notice as follows:

"Notice

Premiums on this policy No. 7812 must be paid as

provided for in the ploicy and may be made, at the option of the insured, at the following rates: annually $63.12, semi-annually $43.22, quarterly $22.02, monthly $7.62.

Be sure to have premium paid on or before the date they are due."

The last clause is not in large bold type as set out in counsel's brief, but uniform in size with the other part of the notice. It does not purport to be a part of the policy but a notice as to a clause in the policy. The only purpose of inserting such a notice is because it is known by all men that the ordinary person is prone to oversight and neglect in such matters and usually insurance companies send advance notices by mail, of premium dues. The notice shown does not advise the insured when his policy will lapse, but of the due date of the premium only, and appellee cannot rely on this notice, which the appellee itself, time and time again, during the years from 1909 to 1918, had rendered nugatory.

If there was any question about the law, as applied to this situation, appellee's brief fully supplies the complements in the cases cited: **Thompson v. Fidelity Life Ins. Co.** 92 S. W. (Tenn.) 1098, 6 L. R. A. 1041; **Crossman v. Mass. Ben. Ass'n.** 143 Mass. 435, 9 N. E. 753; **U. S. Life Ins. Co. v. Ross,** 159 Ill. 476;

Hensel v. Capital Fire Stock Ins. Co. 219 Ill. App. 77; and **Globe Mutual Life Ins. Co. v. Wolf,** 95 U. S. 326.

It may be that a different rule might be followed in a court of law, but appellee, having submitted this cause to a court of equity, it is the opinion of this court, taking into consideration the manner that premiums had been paid and accepted from 1910 to 1918, that when appellee received the check on April 4, 1918, for the premium due February 25, 1918, and upon which the last day of grace was March 27, 1918, it was not equity and good conscience for appellee to refuse the check and lapse the policy. Appellee had waived the right to adopt that course.

Appellees insist that the policy had lapsed because the insured, about the middle of April, 1918, filed a petititon for reinstatement, but it is shown by the testimony of Neu that this petition was forwarded by the insured and Neu fully relying upon the reprenentations of the appellee that the policy had elapsed. No consideration was paid for this position taken by the insured, and at most it could only amount to a minor evidentiary admission induced by appellee, that the appellee had not waived the prompt payment of dues.

It is lastly contended by appellees, that the construction given to the policy and "rider" attached, that upon default paid-up insurance became operative automatically under the terms of the policy, was error and in violation of the terms of the "rider" contract. Under the terms of the policy, without the "rider" clause, after the payment of premiums three full years, the insured had certain options and rights to convert his policy and valuation fund into a loan, cash, paid-up insurance, or extended

insurance, and in case of default the insured could exercise this option any time before the final day of grace, thirty days after due date of premium. The printed form of policy provided that in case the insured failed to exercise the option, the provision for paid-up insurance should automatically apply. But in this case the creditor, Neu, was a party to this insurance contract from 1904 down, and this "rider" contract, a tripartite agreement, between appellee, Neu and the insured, had been attached to and formed a part of each policy issued to insured. It was an original agreement and so termed in the policy. It was entered into for the purpose of securing Neu's debt. In this rider agreement, it was "expressly agreed that none of the privileges of cash surrender, surplus or paid-up insurance shall be granted, except by the mutual consent in wrtiing of the insured, said creditor (executors, etc.) subject to the approval of the association, etc. (appellee)."

The terms of the "rider" contract are diametrically

opposed to the provision for automatic paid-up insurance, in case of failure to select, and the typewritten, specialy prepared "rider" must prevail over the printed form provisions of the contract. **Express Co. v. Pickney,** 29 Ill. 392; **Summers v. Hibbard,** 153 id. 102; **White and Gleason v. Chicago,** 188 id. 392; **Chicago v. Weir,** 165 id. 582; **Loveless v. Thomas,** 152 id. 479; **Elliott on Contracts** Vol. 2, sec. 1525.

The effect of the special contract was to entirely wipe out and cancel the provision for automatic paid-up insurance in any event. The exact wording of the "rider" is: "and the conditions and privileges of this contract," (meaning the insurance policy) "are hereby modified in accordance herewith." Nothing could be plainer than that the three parties signing the "rider" intended to render void

everything in the printed form in conflict with the special agreement. Neu was the creditor and was entitled to select his security and signify as to the selection of options, especially when his selection is concurred in by the debtor. He selected, so as to protect himself against a cash surrender or a loan, as either would destroy his security. He selected so as to protect himself from paid-up insurance, as that would destroy three-fourths of his interest. There could be no cash surrender or loan, or paid-up insurance option exercised without the further written agreement of appellant Neu, and the insured and appellee signed this agreement and it colored, modified and changed the entire printed form of the contract, to conform to the letter and spirit of the special agreement. Appellee seeks to avoid this construction, because of the use of the word "granted" in the special contract and argues that literally the word "granted" means something "handed over," "given," "furnished" and that for that reason it cannot modify or change that which is provided to take place automatically, but the word grant also means "a promise," "a thing promised," "conferred," "conceded," "a thing conferred" or "conceded," "a boon," "an admission of something as

true." The meaning of words must be determined from the context and in the "rider" contract the natural meaning of the verb "grant" is to "suffer" or "permit." We cannot give to this word and clause the narrow, technical meaning contended for by appellee.

Appellee cites **Lichtenhan v. Prudential Insurance Co.** 191 Ill. App. 412 and **Blume v. Pittsburg Life and Trust Co.** 263 Ill. 160, in both of which cases there were provisions for automatic application of valuations and provisions for selection of options by the insured, and it was held in the Blume case (page 164):

"That the right to paid-up insurance or surrender value was conditioned upon the surrender of the old policy, within six months from the time it lapsed for the non-payment of the premium, and that a failure on the part of the insured to make an election within the time caused the forfeiture, which was conditional in the first instance, to become absolute after the expiration of six months," and numerous cases are cited supporting this holding. It is a holding, in other words, that courts will not make contracts for suitors and in courts of common law parties are bound by the strict terms of their contract. The Lichtenhan case and the Blume case cited were each actions in assumpsit at common law. Neither of the cases had in it any such equitable element as a special "rider" contract to protect a creditor or any matter that made necessary the construction of cross contracts, nor in either case was it permissible to apply equitable doctrines and rules. The cases cited are not applicable to this case.

Where provisions of insurance contracts are conflicting they will be construed most strongly against the insurer, so that the indemnity may be allowed. **Terwilliger v. Accident Association** 197 Ill. 9; **Accident Association v. Leed,** 95 Ill. App. 43; **Ins. Co. v. King,** 84 Ill App 171; **Healey v. Accident Ass'n.** 133 Ill. 556; **Accident Association v. Frohard** 33 App. 178. With two possible interpretations, the one most favorable to the insured will be adopted. **Insurance Co. v. Hardesty,** 182 Ill. 39; **Sch-**

roeder v. Insurance Co. 109 id. 157; **Insurance Co. v. Robinson,** 64 id. 265. The language in a policy seeking to limit liability is to be strictly construed against the insurer. **Insurance Co. v. Building Association** 175 Ill. 115.

When policy provisions are susceptible to two interpretations

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the one which will sustain the claim of the insured or those in privity with him, must be adopted. **N. W. Life Assurance Co. v. Schultz,** 94 Ill. App. 156. Where a promiser has the right to elect to do one of two things and by his conduct evidences his intention not to do one of the things stipulated to be done, he will thereby be bound to do the other. **Penn. Retreading Tire Co. v. Goeberg** 224 Ill. App. 248; **Gobble v. Lindner,** 76 Ill. 157; **Ridgeley v. Clodfetter,** 43 Ill. 195.

Applying the rules stated to the facts in this case, and considering the policy lapsed on March 27, 1918, it then became the duty of appellee to apply the reserve fund to extended insurance. It had been agreed, in the terms of the policy, by all parties, that in case the policy lapsed after three years, nevertheless the insured should be entitled to the value of the policy, as specified, in the cash surrender, paid-up insurance or extended insurance. All parties by the "rider" contract had agreed that the provisions of Cash Surrender and Paid-up Insurance should not apply in such case, until and unless a further contract in writing should be made. None had been made. It left no alternative for the insured to obtain the valuation of this policy, except to apply it to Extended Insurance. It is agreed that under the terms of the policy appellee could not apply the valuation of the policy to Extended Insurance, without the request of the insured in writing. Even if that argument be granted, the "rider contract" in effect is a request in writing to apply such valuation to Extended Insurance, by providing in writing that it shall be applied to no other option. The exclusion of Cash Surrender and Paid-up Insurance, leaves no method of application, except to Extended Insurance or forfeiture of the benefits, and the latter result equity abhors.

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"Equity looks upon that as done which ought to be done," and in this case if appellee was legally entitled to lapse said policy, then it became the duty of appellee to apply the valuation of said policy to Extended Insurance, doing which, the policy for the payment of two thousand dollars would have remained in force for three years and six months after February 25, 1918, or until August 25, 1921.

The insured, Richard T. Hickman, died in the month of January, 1921, and satisfactory proofs of death were furnished appellee on the 28th day of January, 1921. Appellants should pay the quarterly premium, amounting to $36.44, which became due on February 25, 1918.

In the contract of merger or consolidation between appellee and the Cosmopolitan Company, dated September 9, 1909, it was agreed, that the appellee should have the right to attach to each of its convertible term policies issued to members of said Association, a lien providing 10% of each annual premium per year, computed on the annual premium basis, to be paid by said member on said convertible term policy, to be treated by said company as an impairment lien on account of no examination being required to issue said exchange policy, but we are unable to find that appellee took advantage of said clause or made any such attachment upon the policy in this case.

The decree in this case should be reversed and appellee's bill of interpleader dismissed for want of equity and the cross bill of appellants sustained and decree entered finding that the appellants Harriet J. Hickman and John A. Neu should have and recover from the appellee the sum of $1963.56, with interest on said sum from January 28, 1921, at 5% per annum in full settlement of said policy of insurance, and the said policy should be

cancelled, the amount of said judgment and decree to be distributed to said appellants on an accounting in the Circuit Court of Sangamon County, as their rights in equity may appear.

Reversed and remanded, with directions to dismiss

appellee's interpleader bill for want of equity, and to enter a decree in behalf of appellant's cross bill, in accordance with the views set forth in this opinion.

Reversed and Remanded with directions.

Heard, P. J. took no part.

General No. 7592 Agenda No. 58

April Term, A. D. 1923

Smith Fuller et al., Appellants

vs.

D. T. Garber, et al., Appellees

Appeal from McLean County Circuit Court.

SHURTLEFF, J.

This is a bill in chancery presented by one hundred and seventy-nine complainants against the defendants, based upon a claimed fraud and conspiracy in the sale of stock to the complainants, separately, by the defendants. All of the complainants are similarly situated to the complainants in Mary A. Wilkinson et al v. G. C. Heberling et al., Gen. No. 7585, at this term of the court, and allege in their bill of complaint the identical charges and acts of fraud and conspiracy, in varying language, and in some variance in the minor details, that is set out in Wilkinson et al. v. Herberling et al., **supra,** and with respect to the same corporation stock of the Illinois Silo Company, the Illinois Silo and Tractor Company and The Illinois Tractor Company, the same being successors in name of the same corporation, and the said defendants in this suit being the same and identical defendants as they are set out in Wilkinson v. Heberling et al., except that in this suit the names of George Mecherle, J. A. Wilton, E. J. Sweeney and The Illinois Tractor Co., are dropped and they are not made defendants in this suit and are defendants in said suit of Wilkinson et al vs. Heberling et al. The same principles of law are involved in both suits

and the parties, so far as the demurrer is concerned in the lower court, are the same. Therefore, what is said in Wilkinson, et al v. Heberling et al is applicable in this suit and the opinion as rendered in that case is held to apply in all matters, as set out in this case, and reference is had to the opinion in Wilkinson et al v. Heberling et al supra, as governing and controlling the issues in this suit.

The judgment is reversed and the cause remanded, with directions that the demurrer be overruled and the appellees, defendants, be given leave to answer the bill of the complainants.

Reversed and Remanded with directions.

General No. 7596 Agenda No. 59

April Term, A. D. 1923

Martin K. Duncan, Appellee

vs.

J. Ed Dazey, Appellant

Appeal from the Circuit Court of Shelby County.

SHURTLEFF, J.

This is an appeal from the Circuit Court of Shelby County in a matter of accounting in which a decree was entered in the lower court, stating the account, and finding appellant indebted to the appellee in the sum of $10,325.11, and decreeing its payment and execution.

The facts out of which this case arose have, heretofore, been before this Court, and are fully set forth in Duncan v. Dazey, 214 Ill. App. page 241, to which we refer for a full statement of the case. The purport of the opinion in the former case was, that appellee in this case had in 1903 conveyed a certain described farm, and at a later date appellee's interest in his father's estate to appellant Dazey for the purpose of defrauding and defeating certain specific debts, which appellee considered and was advised by appellant were not just and **bona fide** debts, and which appellee had the right to defeat in any way that he could; that appellee was an uneducated man and very careless in his business affairs, and relied upon and trusted absolutely the advice and direction of appellant, who was a banker, lawyer and sharp and shrewd trader and business man; that appellant to defraud appellee, misrepresented the situation of appellee's af-

fairs to him and having a dominating influence over appellee, and being in a confidential relation to him, by fraud and artifices, persuaded appellee to convey said farm of one hundred eighty acres, subject to a mortgage of four thousand dollars, to appellant, and later to make assignments and conveyances of appellee's interest in his father's estate without any consideration, and for the

pretended purpose of saving appellee from the payment of certain debts and claims which were considered unjust, and the amount of which, from the former opinion, had, from the testimony, been misrepresented to appellee; that by the same fraud and artifices appellee had been induced to leave the State of Illinois and abandon his home and remain out of the State until about 1915, when the suit against appellee was determined and he was compelled to pay the debt.

It further appears from the opinion, that appellant had sold the properties, paid the mortgage of four thousand dollars and interest, and from time to time had furnished appellee with various sums of money, until appellant claimed that having purchased the properties he had fully paid for them, and appellee, claiming a large balance from the proceeds of these properties, filed this bill of complaint.

On the first hearing in the Circuit Court of Shelby County, the bill of appellee, upon evidence taken and a hearing, was dismissed for want of equity.

This decree, in Duncan v. Dazey, **supra,** was reversed and the cause remanded with directions to enter an order referring this case to the Master in Chancery, with directions to state an account between the parties. We have recited this much of the opinion in Duncan v. Dazey, as it has a bearing upon appellant's

first assignment of error.

Appellant first assigns error because no interlocutory decree was entered in the court below, upon the remanding order being filed declaring the rights of the parties, and the rule to be adopted in stating the account. Appellant insists that the reversal in Duncan v. Dazey, **supra** set aside the decree and left the case standing in the same condition as though no decree had ever been entered. Appellant insists that the only order entered by the lower court, after the cause was remanded, as appears by

the record from the Judge's minutes, was an order "to state an account between the parties upon the evidence heretofore taken and reported to the Court by the said Master and any additional evidence that may be offered by the parties hereto."

The decree recites the proceedings in Duncan v. Dazey, **supra,** in this court and the determination in that opinion, by this Court, that the complainant, by reason of fraud and circumvention, was entitled to an accounting. The appellant in this connection further complains because the decree, in reciting the order, of reference, adds the terms, "and his conclusions and findings of fact and law thereon," when no such language is used in the order of court as appears in the record.

Appellant contends it was error to re-refer this cause without an interlocutory decree of the trial court, defining the rights of the parties, citing **French v. Gibbs,** 105 Ill. 523, and **Moffett v. Hanner,** 154 Ill. 649, and the Master, in his report, having made various findings of fact and conclusions of law, appellant insists was error and amounted to a "trap" in view of the order entered, citing **Federal Life Insurance Co. v. Looney,** 180 Ill.

App. 497.

It may be conceded that the order of reference was somewhat informal, but appellant failed to take advantage of any insufficiency in this order in the court below. Appellant should have moved to suppress the report. Objections to the Master's report, not preserved by exceptions before the Court, cannot be raised upon appeal. **Duncan v. Dazey, supra; Snell v. DeLand,** 138 Ill. 55; **Cook v. Meyers,** 54 Ill. App. 590, and **Shaffner v. Healey,** 57 Ill. App. 90.

Appellant, in the lower court, at no time raised any question as to the sufficiency or informality of the order of reference, and neither before the Master or the Court, made objection or exception, because the report contained findings of fact or conclusions of law. As a matter of fact, the Master, upon a re-reference of the case, laid down rules as to stating the account. This was not objected to by appellant. In fact, appellant before the

Master or in the Court below, made no objection or exception upon which this assignment of error could be made except in appellant's fifteenth objection and exception, by which appellant objected to the rule of evidence applied by the Master, requiring appellant to establish the payment of items where it was shown the property had reached appellant's hands. The Master and the Court overruled the objection and exception and appellant does not argue that exception in this Court.

It was held in **Houlihan v. Morrissey,** 270 Ill. page 70:

"Under the order of reference in this case the Master was only authorized to take and report the evidence to the Court. The fact that he exceeded his authority, however, would not jus-

tify the reversal of the decree, if it were clearly right, under the bill and the proof."

Under the bill and the proof in this case, it is equally clear that appellant was not misled or led into a "trap," by the Master's exercising powers in excess of his authority. In a case identical in many respects, **Barnes v. Barnes,** 282 Ill. at page 595, it was held that in a case of accounting where the lower Court heard all of the evidence and entered a decree, making no finding of fact, and did not state an account showing there was nothing due the complainant, but dismissed the bill, the only possible ground for dismissing the bill was that complainant was not entitled to an accounting. To this extent, the facts are identical in the case at bar. Counsel for appellant are in error in their construction of **Duncan v. Dazey, supra,** upon its reversal by this court that it remanded the cause to the Circuit Court of Shelby County, with the former decree cancelled and no decree, interlocutory or otherwise, to take its place. Such is not the construction to be given to the proceedings. The finding and order of this Court was substituted by the mandate and took the place of the former decree, which became a nullity. The remanding order and judgment was, as we have seen, that the complainant was entitled to an accounting, and, if additional rules as to stating the account

were required, it was the error of this Court in its holding in **Duncan v. Dazey, supra,** to which appellant did not except, and not the error of the Court below.

Some of the cases cited by appellant are fully explained in **Harris v. Young,** 215 Ill. App. 493; **Rhodes v. Ashburst,** 176 Ill. 353 and **Southworth v. The People,** 183 Ill. 624.

The opinion in **Duncan v. Dazey, supra,** settled all questions as to appellant (in that case) Duncan being entitled to an accounting, and eliminates all questions of fraud, circumvention and laches from this case as **res adjudicata. People v. Militzer,** 301 Ill. 284; **Bainum et al v. Parish,** 223 Ill. App. 5; **Rhodes v. Ashurst et al,** 176 Ill. 351. There is no merit in the assignment of error.

The main difference of fact between the parties to this cause in an accounting, depends upon whether appellant made a **bona fide** sale of the one hundred eighty acres of land in Okow Township, to one Fry, for the stated consideration of $15,900. **Duncan v. Dazey** does not specifically pass upon this question of fact as to this item.

The appellee and his wife conveyed this farm to appellant on the 22nd day of September, 1903, for a purported consideration of $11,900, subject to a mortgage of four thousand dollars. Appellant, on the first hearing. claimed to have made a **bona fide** purchase of the farm at ninety dollars per acre, which would make a total consideration of $16,200, and agreed to pay the consideration when he sold the lands. The deed recites a consideration of $15,900. On the second hearing it is practically conceded by both parties that no sale was contemplated by that transaction, and that after the transfer was made appellee gave appellant authority to sell the lands, one hundred twenty acres, at one hundred dollars per acre, and sixty acres at sixty-five dollars per acre, making a total consideration of $15,900, the amount named in the deed to appellant. When the deed was executed in September, 1903, appellant gave appellee a bond in return, agree-

ing to reconvey the lands at any time on or before April 1, 1904, 1905, 1906, upon appellee's paying appellant in cash fourteen thousand dollars. There is testimony showing that this bond was executed to be used in procuring appellee's wife to sign the deed to appellant. How this could have persuaded appellee's wife in any manner, it is difficult to determine and all now agree it was a colorable and fraudulent instrument. Appellant claims to have sold and conveyed this one hundred eighty acre farm to J. S. Fry on the 15th day of February, 1905, for a consideration of $16,200, and a deed was executed by appellant and wife to said Fry on that date for the purported consideration of $16,200, and some time thereafter Fry entered into the possession of the lands and made certain improvements. If this were a **bona fide** transaction and sale, and appellee authorized or ratified the sale voluntarily, the assignment of error should be sustained, and this assignment of error covers the substantial amount of the decree.

Many witnesses testified in behalf of appellee that at the time this sale was made the lands were worth from one hundred twenty-five to one hundred thirty dollars per acre. Some witnesses for appellant placed a lower value upon the lands at that time, but in numbers appellee's witnesses predominate.

On the 14th of December, 1907, there was a sale and conveyance of the lands to John Boyle for a consideration of $23,400. The deed was executed by John S. Fry and his wife. The apparent profit on the sale to Boyle, inuring to Fry, was $7,200, and the Master and Court below found that the pretended sale to Fry was a sham and pretense and that appellant should account to appellee for the purchase price paid by Boyle as well as for the rents and

profits during three years at five dollars per acre, making the rent nine hundred dollars per annum, or $2,700 for the period, and added to the profit on the land to appellant or Fry, makes a total item of $9,900, based on this assignment of error. If the sale to Fry was **bona**

fide and should stand, then appellee would not be entitled in an accounting, either to the extra price Boyle paid or to the three years rent of the land. It is insisted by appellant that there is no testimony in the record of this case showing or even tending to show, that Fry was other than a **bona fide** purchaser of these lands, on his own behalf, and that appellant had no interest in and did not profit from the sale. In a record containing so many transactions, deeds, instruments, judgments, purchases and sales, the principal ones of which are now conceded by all parties to have been made for the purpose of defrauding creditors, and the appellee granted equitable relief by an accounting only because of his ignorance, susceptibility to influence and being less guilty than the appellant, it is difficult to tread in such a field and separate the facts from fiction.

We have read the abstracts, record and exhibits with very great care. We feel impelled to take up the consideration of the rights of these parties where this Court adjudicated them in **Duncan v. Dazey, supra.** Before appellant conveyed the lands to Fry, he, appellant, effected a loan upon the lands of eleven thousand dollars from Coleman, which Fry executed. It is claimed that Fry paid appellant for the lands by executing the Coleman mortgage and a second mortgage and notes to appellant for the sum of fifty-seven hundred dollars. The second mortgage was not recorded.

A commission of five hundred dollars was paid to Coleman to effect the first loan for eleven thousand dollars. Neither of these mortgage debts were paid until Boyle purchased the farm and then not for some time until after the title had passed to Boyle. Appellant must have paid the commission of five hundred dollars to Coleman out of the fifty-seven hundred dollar second mortgage. Fry had lived at Bethany, where he owned forty acres of land, subject to a mortgage; had a threshing machine outfit and was good at the bank for not to exceed five hundred dollars. The bank account of Fry with the Bethany Bank is shown, and

it shows a small checking account and a deposit December 24, 1904, of $2263, and in two checks for one thousand dollars each, one March 17 and one March 22, 1905. Fry paid appellant the sum of two thousand dollars which closed his account with the Bethany Bank. Outside of this transaction, Fry's account at the Bethany Bank involved only small amounts. These payments could not have been upon the one hundred eighty acre farm, as appellant testifies that Boyle paid the two mortgages. There was testimony that Fry had not sold his forty acres when these payments were made. Fry was dead at the time of the trial. It is not clear why appellant did not record Fry's second mortgage. Appellee was corroborated in his statement that appellant informed him that the fifty-seven hundred dollars was in unsecured notes. If that were true, Fry had merely assisted appellant to effect an eleven thousand dollar mortgage on the farm. As to the pretended sale by Fry to Boyle, Thomas Finnegan testified he was sixty-four years of age; that appellant informed him that he, appellant, had the farm for sale and would give him a commission of five hundred dollars

to sell the land; that Boyle could handle the farm and that he procured Boyle and showed him the farm. Boyle testifies that Finnegan called him down to Shelbyville and showed him the farm and that they went to the bank and appellant called up Fry to come into the bank, and that Fry came. The contract was entered into at the bank at once, for which Boyle agreed to pay $23,400 for the farm. Boyle gave a check at this time for either two thousand dollars or four thousand dollars at the bank, but does not remember whether it was payable to Fry or appellant. It is testified that at this transaction at first Fry was not satisfied with the terms, but an arrangement was made by which Fry leased the land for a term and was then satisfied. Boyle made all deferred payments at appellant's bank, same being made as late as December, 1908, or the next March. There was testimony that Fry repaired the

buildings upon the farm to the amount of about fifteen hundred dollars, but nothing is shown as to how or in what manner Fry paid for the same. The deed to Boyle from Fry was dated December 14, 1907. It was recorded December 17, 1907. The deed recites a consideration of $23,400. Boyle and Fry entered into a written contract as to the farm on December 14, 1907, and the contract bears the endorsement: "Paid on the within contract $100.00. J. S. Fry, Dec. 14, 1907." Boyle's account with appellant's bank is shown from October 19, 1905, to December 1, 1908, and it shows among other things, a check charged, dated December 16, 1907, for four thousand dollars. Fry's account with appellant's bank was produced in the record on the second hearing. This account appears from October 19, 1905, to March 6, 1912. It is an account of small items, small balances, very rarely running above two or three hundred dollars and but few items in a month. In December, 1907, the balance was $90.55 and there

was not a deposit or check on the account during the month of December, 1907. There are practically no changes of any kind in this account until April 24, 1908, when Fry drew out one thousand dollars, overdrawing his account $733.77, which overdraft was not made good until May 12th following, when the account was balanced. The account remained substantially the same until Fry deposited December 29, 1908, $2828.84, and again on January 4, 1909, he deposited $626.10 and with some other deposits on January 13, 1909, drew out $4014.61 and left a balance in the bank of $11.13. Fry, in the meantime, had sold his forty acres at Bethany and purchased a small place near Shelbyville. From Boyle's testimony he paid four thousand dollars on this purchase on December 16, 1907, evidently when the deed was delivered, two days after the contract. This was not applied to the Coleman mortgage of eleven thousand dollars or appellant's mortgage of fifty-seven hundred dollars for the reason appellant and others testify that neither of those debts was paid by Boyle until

after he had sold the farm to Fitzwater. If Fry was the **bona fide** owner of this farm, he, Fry, received a net profit of sixty-seven hundred dollars on the deal. Of this, four thousand dollars was paid in a check, at appellant's bank, either payable to Fry or to appellant on December 16, 1907, and taken out of Boyle's account at appellant's bank on that day. The balance was paid in deferred payments at appellant's bank by Boyle. What became of it? On this question some of the testimony of appellant's bank employees is illuminating. The cashier, thirty-five years of age, subpoenaed to bring in the John S. Fry account with the bank from January 1, 1905, to date, brought in nothing. He

stated: "Nothing is there, the books have been balanced and the accounts are gone. There is no record of it." Called later, this witness stated: "I have brought no books of account, but have looked for accounts relating to John S. Fry and found no such books. Fry never had any account with the First National Bank so far as I can learn." Later, on the defendant's submission of testimony at the first hearing, the assistant cashier since 1904 was on the stand and testified to Fry making deposits in the bank and Fry's account, but the Master refused to permit appellee to cross examine the witness as to Fry's account or to order the books brought in. Appellant was President of this bank. The two mortgages were not paid on this farm until after February 18, 1909. In this case, after the hearing was closed, an ex parte affidavit, procured from Boyle in Arkansas, was submitted by appellant for a rehearing, but in any material matters set out it only tended to impeach Boyle's testimony on the first hearing and the Court committed no error in refusing to open the case.

We do not pretend to have covered the entire record on this question, but from a careful reading of the entire record and all of the circumstances shown, it clearly appears to this Court that the pretended purchase by Fry was for the benefit and advantage of appellant.

There were many little incidents in the making of the

proof,—refusal to bring in bank books and the ignorance of the Fry account upon the books of the bank; a burglary of appellant's private papers and documents in the safety vault of the bank, to account for the loss of certain evidentiary documents, which with other matters did not impress this court in the former hearing in

Duncan v. Dazey, supra. Coventry, the assistant cashier, testified on the first hearing that Fry, while he lived on the farm, did his banking at appellant's bank. Upon the second hearing Coventry brought in the Fry and Boyle accounts, which have been mentioned. He stated that he knew more about the affairs of the bank in 1905 and 1907 than any other person.

This witness Coventry states that in the sale from Fry to Boyle, the consideration was $23,400, and was paid in this way: "Boyle assumed the obligation of eleven thousand dollars which was Fry's mortgage to Coleman. and that he assumed another mortgage of $5700 to appellant; Boyle gave Fry, when the deal was consummated on December 16, 1907, his note for $2700 to be carried by Fry until Boyle finished some other land deals of his own."

Three deposit slips, under date of December 29, 1908, one year after the transaction, one for 16.60 marked "Scraggin's check" and one for 461.01, marked "Boyle's check" and one for $2351.23 marked "Boyle's check" are produced, and appear credited in Fry's account, the three totalling $2828.84, but only the last check for $2351.23 is charged to Boyle's account. However, these may have been Boyle's checks and come from some other source. Another deposit slip for $39.00 marked "Boyle's check" is produced, which Coventry says was for interest on Boyle's twenty-seven hundred dollar note. These deposit slips were made about the time Fry was leaving Boyle's farm. The note, if given by Boyle, had been running about one year. The 39.00 would represent about three month's interest. The first check sent by Boyle was from some other bank and deposited by Fry in appellant's bank. Fry, from March 1, 1908, to March 1, 1909, was renting the farm in question from Boyle, the work land on shares and the pasture lands at

five dollars per acre, and the account may have involved the purchase of Fry's crops and stock upon the farm when leaving the place. Fry had paid appellant two thousand dollars from the Bethany Bank, when he went upon the farm, and this was doubtless for personal property and crops for which Boyle paid him in return. Boyle, who would be as likely as any persons to remember such a note, if given, testifies to a different statement of facts, and fails to mention the note in the affidavit. Coventry does not pretend to have any knowledge as to whether Fry or appellant received the four thousand dollar check December 16, 1907, or what became of it, appellant's bank books, without question, if accurately kept, would have determined that question. Coventry states that Fry did not buy the farm south of Shelbyville until after Boyle paid him the twenty-seven hundred dollars and he then checked out $4014.-61 from appellant's bank, which amount had accumulated from a number of small matters, and the Boyle checks for $2828.84. Boyle's testimony and the record would indicate that he dealt in large amounts and was not much troubled in getting amounts of money together, in driblets, to pay a note of twenty-seven hundred dollars. The proof is overwhelming that appellant had the benefit of the four thousand dollars paid by Boyle on December 16, 1907, and that Fry's purchase of the land was not **bona fide.** A trustee and a banker, in law, cannot be permitted to account to his **cestui que** trust in such a manner. **Mylie v. Bushnell,** 277 Ill. 484; **Illinois Lien Co. v. Hough,** 91 Ill. 63.

The Court will sustain the findings of the Master in Chancery, as confirmed by the chancellor, unless they are against the weight of the evidence. **Perks et al v. Tiffitt,** 202 Ill. App. 619;

Smith v. Thomas Elevator Co. 278 Ill. 332; **Day v. Wright,** 233 Ill. 218; **Hubbard v. Hubbard,** 79 Ill. App. 217.

The Master's findings are **prima facie** correct and are of an advisory nature to the court. **Chicago Title &**

Trust Co. v. Central Trust Co. 224 Ill. App. 480; **Williams v. Lindblom,** 163 Ill. 346.

It follows from what has been said that appellant's assignment of error, in that the Master charged him with the Boyle purchase price of the land, namely, $23,400, and for the three years rental value at nine hundred dollars per year, making a total of $9900 of the decree, should be overruled.

Appellant submits the issue that appellee was guilty of laches, that appellee acquiesced in many of the transactions carried out by appellant, and that, having acquiesced in the sale of the land for a period of twelve years, he cannot now he heard to complain. It was held in **Duncan v. Dazey, supra,** on page 250:

"The Master made no findings of law or fact upon the defense of laches, the statute of limitations or the statute of frauds. Appellee (appellant in this case) filed no objections to the Master's report, and these questions are not preserved for our consideration. **Shaffner v. Heoly,** 57 Ill. App. 90; **Snell v. DeLand,** 138 Ill. 55; **Cook v. Meyers,** 54 Ill. App. 590."

It is sufficient to say in this case that even though it were open to raise these questions on the second hearing, the Master in the report now under consideration, made no finding as to any of these questions, and the appellant filed no objection and took no exception thereto. No such issues are now before this Court, in any event.

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Appellant assigns error on the ground that in the accounting he is charged with the value of seventy-seven hogs. as of April 26, 1904, to the amount of $351.28, and is not credited with the purchase price of the drove of hogs, amounting to $606.10, a number having died. It is evident that appellee left no such number of hogs on the farm. Appellee states that there were six or seven sows and some fall pigs and the son Aubrey Duncan testifies to going to the farm and loading these hogs in wagons and taking them to his farm and selling the hogs. It is plain that appellant should not be charged the rental value of the land and in addition be charged with a portion

or any part of the proceeds. There is no assignment of error made as to appellee's credit of $351.28, and to sustain appellant's assignment of error for the purchase price of the hogs, is to interject into the account a subject matter which should not properly be in the account. We do, however, sustain this assignment to the extent of $351.28, which will have the effect of removing this subject matter from the account.

Appellant assigns error in that he is charged with receiving a check for $284.28 from the administrator of the estate of appellee's father, which appellant admits but claims credit for the amount, by reason of having endorsed the check which was payable to appellant, and forwarded it to appellee. A receipt to the administrator is shown bearing appellee's signature, "by Richardson and Whitacre." If appellant's version of this is correct, the administrator's check for the amount was returned to the administrator, bearing both appellant's and appellee's signatures, and could have been used as a voucher and very likely could have been

produced. No effect seems to have been made to find the original check. Appellee denies ever having received this check or any funds from his father's estate. In this state of the record, appellant's assignment of error cannot be sustained.

After the second hearing was closed and Master's report filed and exceptions overruled, appellant filed a petition for rehearing, based upon the findings of certain letters written to him by appellee, the only material parts of which were in one dated January 25, 1904. Among other things appellee writes: "Don't sell farm for less than 100 per acre for 120 and 65 for the 60" and in a letter dated June 22, 1906, among other things, appellee writes: "If you cant come down Saturday or Sunday meet me in Sullivan with 2000 of that security on the farm. I cant afford to take a loss on 77 cent wheat."

At that time appellee was speculating in grain at St. Louis. The theory of this case is and was in **Duncan v. Dazey, supra,** that the appellee was not a free agent, act-

ing voluntarily but by various frauds and artifices was under the complete control and dominion of appellant; that appellant even implanted the fear of arrest on some mythical criminal charge in his mind if he should return to Illinois, and for nearly twelve years following September, 1903, appellee's actions were practically absolutely controlled by appellant's direction and advice. It was on this state of facts, as found, that this Court reversed the former decree and ordered an accounting. We feel bound by the decision in that case, and the reasoning upon which the finding was made.

The petition for rehearing further set out the affidavit of Boyle, which has been discussed.

The Court below committed no error in refusing to reopen the case.

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Appellant assigns error on the order of the court allowing the Master in Chancery, for examining evidence in the case, approximately 1850 pages, preparing statement of account, finding of facts and making of report, five hundred dollars, out of which the reporter's fees, amounting to $88.50, were to be paid, making an allowance to the Master of $411.50, with no itemized statement of said services and no evidences having been heard as to the value of such services. This allowance so made, without an itemized statement as to services and on no evidence submitted, and counter to the ruling made in **Herpich v. Williams,** 300 Ill. 504, was an error.

Appellee has assigned cross error in that the Court below did not allow appellee interest on the sum found due, $10,325.11, from March 1, 1908, as recommended by the Master, and appellee insists very strenuously that such interest and, indeed, compound interest, should be computed on the balance as found due, citing **Ogden v. Larrabee,** 57 Ill. 408, as the rule applies to trustees who misapply their trust or refuse to account.

Appellant insists that there is no evidence in the record tending to show that appellant made any profit out of the property, and in view of the various payments made by appellant to appellee from time to time, appel-

lant insists strenuously on the rule that interest can be recovered in this state only upon a contract or agreement to pay interest, or by reason of some provision of the statute. Fitzgerald vs. Benner, 219 Ill. 491.

We are much impressed with the cogent reasoning of the very learned chancellor who heard the case below, in his written opinion deciding the case and upon the question of interest, as

follows:

"The only real objection that I can find to the report of the master is the one concerning the question of interest. The master found that the complainant, Duncan, was not entitled to receive compound interest, as was insisted upon by Duncan. When I take into consideration the finding of the Appellate Court **which is the law of this case,** so far as announced by that Court, that the complainant was guilty of the fraud complained of and that he voluntarily made this conveyance in question, and by so doing committed the fraud, as has been found, how then can it be said that he ought to be permitted to recover anything other than the property that he conveyed to the defendant Dazey or the value of the same? The finding of the Appellate Court, in holding that Dazey was a trustee, is to the effect, that, Dazey could not be permitted to profit by reason of his participating in this particular transaction in the manner and for the purposes which he did. If that be true, how can it be said that Duncan should be permitted to profit out of a fraudulent transaction in which he participated?"

Assuming that the case was presented to the chancellor, as it has been presented to this Court, the inquiry is most natural. We are not at all inclined in this case to countenance a rule, sometimes denominated "harsh," "sometimes "penal" and again "compensatory," that may be enforced against trustees as to estates undertaken, in an orderly manner, to conserve as trusts, where the trustee has misapplied, or used it for personal gain. The element of delicto committed by the appellee certainly enters into the equation. The holding in **Duncan v. Dazey supra,** was

that appellant Dazey had the master mind and exercised an inexplicable influence over that of appellee, and that appellee, Duncan, followed appellant's advice during all of that priod of time absolutely and unquestionably, and the relations between these parties could not have been more confidential if they had been between attorney and client. Appellee's lack of intelligence and weakness of character are pointed out and demonstrated by pieces of evidence, by this court, to the extent that a fair construction of that opinion and finding is more to the effect that appellee was guilty only of a constructive fraud or wrong, and more in need of a conservator than guilty of any fraudulent act. We conclude that in the accounting appellee was entitled to his own, and interest on any sum found due, if the statute permits it. Almost this entire claim is based upon the consideration paid for the farm by Boyle and the rental value of the farm for three years. If the sale to Fry was genuine, then appellee practically had no claim and appellee had been paid in full, less a minor amount under one hundred dollars.

The bill of complaint in this case was first filed in the Circuit Court of Shelby County October 6, 1915, to the November Term, 1915, of that court. The bill was filed upon the theory that the sale of the lands to Fry was genuine and, so far as Fry was concerned, a **bona fide** sale. The pleadings were settled and the cause proceeded to a hearing before the master, when it was discovered by appellee, for the first time, that the pretended sale to Fry was a fraud and pretense and that Fry had held the lands for the benefit of appellant, until December, 1907, when appellant had sold the lands to Boyle for $23,400. The

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proceedings before the master were suspended and appellee, by leave of court, had filed an amendment to the bill of complaint March 26, 1917, setting up the sale to Boyle for $23,400, and appellant's use and occupation of the lands prior to the sale to Boyle. This decree to the extent of $9,900, as we have before

held, must stand upon the finding that the sale to Fry was a sham and pretense, and that appellant had the use of the lands until December, 1907, and the proceeds of the sale to Boyle. Such being the case, appellant is in the position of receiving money to the amount of $9,900 for the use of appellee and retaining the same without appellee's knowledge, and comes squarely under section 2 of chapter 74 of the Revised Statutes, and should be charged with interest on such amount from March 1, 1908 at the rate of five per cent per annum, to date.

As to the Interest Statute, appellant upon petitioning for a rehearing of the case, shows that: "Under the statute of 1874 interest was recoverable on money due on the settlement of an account from the day of liquidating of the account between the parties and an ascertaining of the balance; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay of payment;" and "that said statute has been amended by omitting the semi-colon after the word balance," so that its present meaning would be, as applied to moneys received to the use of another and retained without the owner's knowledge, that it only applied upon liquidating the account and ascertaining the balance. This construction would render meaningless the language: "retained without the

owner's knowledge," for the reason that the owner could not arrive at a "balance" or "liquidation" of any moneys that he knew nothing about. Starr and Curtiss Annotated Statutes make the note of the semicolon being dropped as indicated by appellant. The other statutes, so far as we have been able to examine them, still carry the semicolon. In our opinion it makes no difference in this case.

This covers all assignments of error that have been argued by counsel on either side. Some of the arguments of counsel, and many of the pieces of testimony adduced, we have not been able to cover owing to the voluminous record.

Appellant in this Court, appellee in **Duncan v. Daz-**

ey, supra, in that case asked for no findings of fact or conclusions of law on the first record, so that this Court, in this case, the same as the chancellor below, has felt impelled to follow the ruling made in **Duncan v. Dazey, supra,** and eliminate some matters that could have been made a subject of contention on that hearing.

From what has been said, it follows that the decree of the lower court should be reversed in part and a decree entered in part in this Court, and the cause remanded in part.

The decree of the lower Court is reversed and a decree is entered in this Court that appellee, Martin K. Duncan, have judgment against the said appellant, J. Ed Dazey, for the said principal sum of nine thousand nine hundred seventy-three and 83-100 dollars ($9973.83) with interest on the sum of nine thousand nine hundred dollars ($9900) at the rate of five per cent (5%) per annum from March 1, 1908, to the date of the entry of this decree and the costs of suit, except as to the amount of the

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Master's fees, and as to those fees the decree of the lower Court is reversed and the case remanded to the trial court with direction to give further consideration (taking such proof as found necessary) to the amount of time consumed and the proper charges for the various items in question and to re-assess the Master's fees in accordance with the views of this Court, as set forth in this opinion and the decisions cited herein.

Reversed and Judgment entered in this Court in part and remanded in part.

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General No. 7605 Agenda No. 65

April Term, A. D. 1923

John Gossage, Appellee

vs.

Litchfield Creamery Company, A Corporation, Appellant

SHURTLEFF, J.

Appeal from the Circuit Court of Sangamon County.

This was an action on the case brought by appellee against appellant in the Circuit Court of Sangamon County, to the September Term, A. D. 1922, to recover damages in an action on the case for an alleged injury which occurred on the 23d day of May, 1922, on account of a collision between appellant's motor truck and appellee's wagon, in Peoria Road near the intersection of Garfield Street and Elizabeth Street, in the City of Springfield, in which collision appellee claimed he was thrown from his wagon to the pavement and was injured.

The original declaration filed in the case by appellee charged appellant with the duty of exercising reasonable diligence and care in approaching the wagon of the plaintiff and in attempting to pass the wagon of the plaintiff, to reduce the speed of the automobile to such a rate as was then and there reasonable and proper, having regard for the traffic and use of the way, and charges a failure to observe that duty, and negligence in the collision with said wagon and injury.

A general and special demurrer was filed to the original declaration which was sustained, and the original declaration was

amended by leave of court, and thereafter there were filed two additional counts which charged the defendant with so negligently driving and operating his said automobile in said certain public highway known as Peoria Road, in a closely built-up portion of the City of Springfield, and operating his said automobile at a speed greater than was reasonable and proper having regard for the traffic and use of the way, so as to endanger the life or limb or injure the property of the plaintiff, and

charges the defendant with driving his said automobile before and at the time of the collision with plaintiff's wagon at a rate of forty miles per hour and that by reason of such alleged negligence, the collision occurred and the plaintiff was thrown from said wagon with great force and violence upon the pavement and injured and bruised about the legs, arms, and body and sustained damages in consequence thereof.

The second additional count of the declaration is similar to the first count.

To which declaration as amended and the additional counts, the defendant filed the plea of general issue.

At the November Term of the Circuit Court this cause was tried by a jury which returned a verdict finding the defendant guilty and assessing plaintiff's damages at the sum of $1,750.00.

Appellant entered a motion to set aside the verdict and for a new trial, which was argued and overruled by the court, to which order and ruling the defendant then and there excepted, whereupon the court entered judgment on the verdict in favor of the plaintiff and against the defendant for the sum of $1,750.00 and costs, to which order and judgment the defendant excepted and the case is brought to this court by appeal.

Testimony was introduced by appellee and appellant, and the case was sharply contested as to whether the injury was caused by the negligence of the appellant, or whether it was caused by an accident, the streets being wet and slippery and the vehicle of appellant having skidded, which appellant claims caused the injury. Appellant offered testimony tending to show that its vehicle, at the time of the accident, was traveling at a speed of less than fifteen miles per hour. The appellee had offered testimony tending to show that the speed of appellants vehicle, at and just before the time of the injury, was in excess of fifteen miles per hour. In this state of the proof, the court instructed the jury, at the request of appellee as follows:

"The Court instructs the jury that the statute of the

State of Illinois provides that no person shall drive an automobile or automobile truck designed or used for carrying freight or merchandise upon any public highway at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life, limb or property of any person; and that if the rate of speed of any such motor vehicle, where the same passes through the residence portion of any incorporated city, exceeds fifteen miles per hour, such rate of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb of any person."

Appellant duly objected to the giving of said instruction, and presented the said objection to the court below as one of the grounds for a new trial, which was overruled and the exception has been properly preserved by bill of exceptions.

The giving of this instruction was error. It was directly in conflict with the rule laid down in **Johnson v. Pendergast,** 308 Ill. 255. It was said in **Johnson v. Pendergast, supra,** page 262: "The existence of the **prima facie** case is provisional, and does not change the burden of proof but only the burden of introducing further evidence. It means only that a determination of a fact shall be sufficient to justify a finding of a related fact in the absence of any evidence to the contrary. The only effect is to create the necessity of evidence to meet the **prima facie** case created, and which, if no proof to the contrary is offered, will prevail. **(Helbig v. Citizens Ins. Co.** 234 Ill. 251; **City of Carlinville v. Anderson** 303 id. 247; 2 Chamberlayne on Evidence, sec. 994; **Inhabitants of Cohasset v. Moore,** 204 Mass. 173; **Kelly v. Morris** 6 Pet. 622.) As soon as opposing evidence is received the case is to be determined upon all the evidence,—the **prima facie** evidence and all other evidences,—and the question is whether the weight preponderates in favor of the party having the burden of proof."

The giving of this instruction entirely ignored appellant's defense that the street was wet and slippery and that the injury was caused by appellant's vehicle skidding. It was further said in **Johnson v. Pendergast,** page 264: "This made a **prima facie** case of negligence on his part under the statute, but he offered evidence, to meet that **prima fcaie** case, that the roadway was clear and no one in the way. It was proved and not denied that no signal was given by the hand, which made a **prima facie** case of negligence of the driver of the automobile under the ordinance, but she testified that she looked back and waited for a Ford car to pass, and after it had passed looked back again and saw there was nothing more coming, which was intended to meet the **prima facie** case under

the ordinance. The plaintiff offered evidence that the street was clear, and the defendant offered evidence of the same character as to the condition of the street at the same time. There was other evidence to be considered which need not be mentioned, and the issues were to be determined upon all the evidence. The instruction given entirely ignored the evidence for the defendant that the driver of the automobile looked back and that no one was coming."

It is true that the instruction as given, went further and advised the jury that if they believed from a preponderance of the evidence that the defendant was guilty of negligence and that he drove his car at a greater rate of speed than was reasonable and proper, while the appellee was in the exercise of due care for his own safety, then the jury should find the defendant guilty. But as we understand the rule, it is the vice of instructing as to the **prima facie** case, where testimony is offered by a defendant, to rebut such **prima facie** case, or the instruction ignores any of the defenses made.

Other assignments of error are made, but inasmuch as the case will have to be submitted to another jury, doubtless any other errors appearing in the record will be

corrected on another trial

For the reasons given in the opinion, the judgment of the lower court is reversed and the cause is remanded for another trial.

Reversed and remanded.

General No. 7616 Agenda No. 68

April Term, A. D. 1923

Lena Spangler, Appellee

vs.

Albert Geiger, Appellant

Appeal from McLean County Circuit Court.

SHURTLEFF, J.

This is an appeal from McLean County Circuit Court, to reverse a judgment recovered by appellee against appellant for personal injuries.

On June 23, 1921, appellee, in a Buick car, driven by Edna Murfield, a young lady, and accompanied by a niece, Mrs. Mabel Kilpatrick, was returning from Towanda to El Paso in this state, and while going east on the public highway, about two and one-half miles northeast of Towanda, came to a collision with appellant's Halliday five passenger car, in which appellant was driving, accompanied by his wfe, two daughters, and two nieces and Mrs. Burger, daughter of a cousin of appellant's living in Ohio. The accident occurred late in the afternoon, about four-thirty or five o'clock. The road at the point of collision runs straight east and west, and was substantially sixty feet in width. There was a graded roadway in the center of the road twenty-eight feet wide, of which a strip on the south side, eight feet wide, was graded dirt, sloping downward to the south edge of the graded roadway. North of this, through which the center of the road ran, was a

strip ten feet wide oiled and the strip north of this, ten feet in width to the north edge of the roadway was graded dirt. On either side of the graded roadway was a bank of weeds and grass, and a ditch, the ditch on the south side averaging four feet in width, and the ditch on the north side averaging about three and one-half feet in width, though on the north side it would appear that there was a bank, substantially three and one-half feet wide, between the north edge of the road-

way and the side ditch. Thirty feet west of the point of collision, a lane or driveway, coming from the north, enters the public highway running east and west and appellant was driving south on this lane, and drove to the road and turned to the east, going in the same direction as the car in which appellee was riding. Where the lane enters the public highway, there is first a grass plat ten feet in width, then the ditch in which the testimony shows a metallic culvert had been placed, covered over with dirt, then a space of about three and one-half feet from the culvert or ditch to the edge of the road, but after crossing the culvert or ditch coming south, the track, traveled, forms a "Y" turning to the east and west.

The appellee's case, as made by the testimony, shows that the occupants of the Murfield car saw appellant driving south in the lane, when appellant's car was about 200 feet north of the gateway and driving at the rate of twenty miles per hour. The Murfield car at this time was about 300 feet west of the gateway, on the south or right hand side of the road, traveling at the rate of twenty-five miles per hour. On first seeing appellant's car coming south, Edna Murfield, and the occupants of her car, testify that Miss Mur-

field honked her horn twice. Both cars were left hand drivers. Mrs. Kilpatrick sat in the middle and appellee on the right of the single seat of the Buick roadster. Appellant drove his car to the road, a part of appellee's testimony showing that appellant drove on a curve, southeast from the lane, to the south or right hand side of the roadway, over and across the center and after traveling about fifteen feet east, then turned northeast to go to the north or left hand side of the road, and after proceeding about fifteen feet further and being over the center and on the north side of the road facing a northeasterly direction, appellee's car crashed into appellant's car on the right rear part of appellant's car, crushing the gas tank of appellant's car in between the springs and demolishing the right rear fender and wheel of appellant's car. The collision took

place about thirty feet east of the driveway. Both cars were hurled towards the north ditch, the Murfield car heading northeast, its front wheels in the ditch and appellant's car being in front of the Murfield car and alongside and about a foot and a half from the ditch. The collision threw appellee forward in the Murfield car, breaking both limbs and her nose. Appellee was a single lady sixty-five years of age and had had a previous injury, a fractured hip. Appellee's testimony further shows that the speed of neither car was slackened before it reached the gateway of the lane and taking the speed of the cars and the distances, as testified to by appellee's witnesses, the Murfield car would have been but fifty feet west of the gateway, when appellant arrived at the north line of the road. Appellant still had thirty feet to travel, even in a straight line, to reach the center of the road, and in making the curve to carry his car over the center or even

to the center and fifteen feet east of the gateway, the car would hve had to travel at least forty feet, in which time, according to the testimony, the Murfield car would have come to a point even with the gateway and appellant's car would have been fifteen feet further east.

According to the testimony, Edna Murfield, seeing appellant driving his car out of the driveway, towards the south side of the road, pulled her car to the left, in an attempt to pass appellant's car on the left or north side of it. She gave, however, at that time, no sign or signal of her attempt to pass. When Miss Murfield saw appellant turn the course of his car to the north and start to cross the road northeasterly, and in front of her car, she then turned her car to the southeast, in an attempt to pass appellant on the right, but too late and the left front of the Murfield car crashed into the rear right of appellant's car.

It is shown by the testimony that appellee, living in El Paso, had a desire to visit a nephew who was sick at Towanda. She had spoken about it to Edna Murfield, who as a volunteer, had borrowed the Buick roadster from Arthur Hildreth of El Paso, and was taking appellee

to Towanda, for the purpose set out, without any charge or fee either for the car or driver.

Mabel Kilpatrick, who was a friend of appellee's whom appellee had raised from the time she was three years old, until she was married, accompanied them.

Appellant's declaration in the first count charges general negligence and the second count is based upon the statute, which made it the duty of appellant, at the road intersection, to give

the right of way to the vehicle at the right, which it is charged appellant in this case neglected to do. The third and fourth counts charge negligence on the part of appellant, in turning northward in the road, in front of the Murfield car and preventing the Murfield car from passing on the left, after proper signal given, but the testimony does not show that the Murfield car gave any signal, except when 300 feet west of the gateway and before appellant had entered the public road, and appellee cannot recover under either of those counts.

The first additional count charges that it was the duty of appellant, under the statute, when coming to this road intersection, to drive his car across the center and to the south side of the road, which appellant neglected to do and the second additional count charges appellant with negligence in suddenly and without warning turning his automobile sharply to the northeast and immediately in front of the Murfield car and hence causing the collision.

Under the first additional count, appellant would have been required to cross to the south side of the roadway, as a duty owing to a driver proceeding west on the noth side of the highway, but appellant owed no such duty to a driver, proceeding in the same direction, from the rear, to drive immediately in front of such car. Under the second additional count, the statute of 1919, in force when this accident occurred, in Section 33 reads as follows:

"No driver of a vehicle shall suddenly stop, slow down or attempt to turn around without first signalling his intentions with outstretched arm or otherwise to those following closely in the rear."

The testimony does not show that appellant violated this section or we cannot conclude that it is the law that every driver

must signal those in his rear, on every change he makes in his course on the public highway. If this is a charge of general negligence in this case, it was fully covered by the first count of the declaration.

Appellant at the close of plaintiff's case and again at the close of all the evidence, moved the court to instruct the jury to find for the defendant and submitted the written instruction, which the court refused. This is assigned as error and is the principal ground upon which appellant contends for a reversal of the judgment. It is contended that the testimony submitted by the plaintiff is not sufficient, standing alone and undisputed, upon which to base a verdict and judgment for appellee.

There is no question of contributory negligence on the part of appellee. The case has been submitted to three juries. There was first a disagreement and there have been two verdicts for the appellee. In the view taken of this case by this court, appellee's whole case is based upon the first clause of Section 33 of The Motor Vehicle Law, as set out in appellee's second count in the declaration, reading as follows:

"All vehicles traveling upon the public highways shall give the right of way to other vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left."

Was appellant negligent or did he violate this clause of the Act in the accident in question? The testimony is certain that the view from the road to the driveway was clear and unobstructed. Appellee's witnesses so testified and in fact appellant testified

that he saw appellee's car when twenty-five or thirty rods from the road. Appellant saw the Murfield car before anyone in the Murfield car saw appellant. Appellant was at the gateway when the Murfield car was only fifty feet away. When appellant was at the center of the road, the Murfield car could not have been more than fifteen or twenty feet distant from appellant's car. On the whole case, the only substantial disputes, over questions of fact, were:—the distance west of the Murfield car, when appellant drove through the gateway, and the distance south into the roadway, which appellant drove, before turning to the east. Appellant and all of his witnesses testify that the Murfield car was 175 feet to the west, when appellant drove through the gateway. Under all the testimony this seems to be an absolute impossibility. Appellant's witness Quensel found appellant's car after the accident only thirty to thirty-five feet past the driveway and he found the Buick car in which appellee was riding about thirty feet from appellant's car and all of appellee's witnesses place the Buick car to the west of appellant's car. In fact, the Buick car could not have gotten in any other position or direction from appellant's car. Appellant testified that the Murfield car landed forty feet west of his car. The Murfield car would have had to travel 205 feet, while appellant was traveling not over sixty feet.

Apepllant offered no testimony as to the speed of either car. If appellant's car was traveling at a speed of ten or fifteen miles per hour, the Buick car must have been going at a speed of thirty-four or fifty-one miles per hour, according to the testimony of appellant's witnesses. Appellant further insists that at no time did he cross to the south side of the road, but that he drove to the center of the graded roadway and then proceeded

directly east, making no turn to the north at any time.

Appellee produced a witness Jones, for whom, apparently, appellee and appellant vouch, who examined the tracks of appellant's car, about thirty minutes after the

accident. This witness states:

"The track came out of the lane and went east about fifteen or twenty feet before it turned towards the ditch. It was a regular turn." As to how far south appellant's car went the witness states: "I don't know exactly where the center of the road was, but I would judge the right hand track was slightly over the center of the road."

One of appellant's witnesses states that she saw the Buick car just before it crashed into appellant's car and that it was "zig zagging" all over the road. This in a way corroborates appellee's testimony that Edna Murfield first tried to pass appellant's car to the north or left hand side and then turned to pass on the right hand side. Both cars were demolished. Appellant testifies that the crash raised the rear of his car and shoved it about two feet to the south and forced it into the ditch. This action could not have produced the track, making a "regular turn" to the north of which the witness Jones testified.

There are many things in this record that are not made plain and certain. In fact, on the salient facts, the testimony is in direct conflict. The greater number of witnesses testifying for appellant, place the Murfield car at 175 feet distant, and west from the driveway, when appellant drove upon the road, but the location of the accident,—and it was placed nearer to the driveway by appellant's witnesses than by those offered by appellee—make it impossible that the Murfield car was so great a distance from the driveway at that time. If appellant was driving in the center

of the highway, as he contends, or even if he was following the straight course, where the witness Jones found the tracks, then the Murfield car had at all times a space of nine feet clear, on the left side of appellant's car, to drive a car only six feet in width. In this situation, it is not clear why the Murfield car should change its course and try to pass on the right hand side, if appellant was making no effort to turn further to the north. It was objected that Edna Murfield was per-

mitted to testify as to rates of speed the cars were traveling, without showing sufficient qualifications to judge rates of speed, but she testified that she was twenty-five years of age and had been driving automobiles for three years prior to June, 1921. The witness did not, by her testimony, show that she was qualified to judge rates of speed, but the witness Kilpatrick did testify to the rates of speed of the cars and it was not objected to and is nowhere contradicted in the record. Mabel Kilpatrick testified when they first saw the Geiger car, the Murfield car was traveling at a rate of twenty-five miles per hour, the Geiger car not so fast, probably twelve or fifteen miles per hour. This witness states that when she first saw the Geiger car, the Murfield car was about 200 feet west from the lane and that when appellant's car came out upon the road, the Murfield car was less than sixty feet west from the driveway. The rate of speed was not important except as it may have tended to corroborate the testimony on one side or the other, as to the location of the Murfield car, when appellant drove upon the highway. There was legal and competent evidence submitted by appellee tending to show that the Murfield car was not over fifty or sixty feet west of the driveway gate

when appellant drove his machine through the drive with thirty feet further to go before bringing his car to the center of the road, which would bring, under the testimony, the Murfield car forty feet closer to appellant's car, when appellant's car arrived at the center of the roadway, and without doubt this was the exact situation, the Murfield car not being more than fifteen feet behind the Geiger car, when appellant Geiger arrived at the center of the road, for all testimony agrees that the collision took place within the next ten or fifteen feet. Such being the state of the proof, it was for the jury to say, if they believed this evidence, whether the appellant violated the statute in not giving the Murfield car the full right of way, before driving upon the road and whether such violation was the proximate cause of the injury, and two juries having passed upon this question, in appellee's

favor, it is the opinion of this court that this verdict should not be set aside on this assignment of error. As to whether the driver of the Murfield car was guilty of negligence, we express no opinion and we do not hold that appellee could not recover under the first count in the declaration. We express no opinion on that question.

Appellant assigns error upon the overruling of appellant's objection to the admission in evidence of a plat, drawn by an engineer, giving the lines and distances of the lane and road, having the lines showing the edges of the graded road, the oiled strip and the dirt strips on either side, the ditch and grass plat on each side of the road, and the gateway and post markings on the north side of the highway. At the lane or driveway, the plat shows the marks for wheel tracks going north and across the opening is a line marked with an arrowhead and in small fine type above the line

are the figures 12'—2" and immediately below the line in the same small sized type is the word "clear." The plat also is marked in the proper place, "oiled strip of roadway," "side of ditch," "grass and weeds," etc. The witness testified to the measurements and other data, but did not explain the meaning of the word "clear," and appellant contends that this was injecting into the record and presenting to the jury written evidence that should not be in the record, and which tended to confuse and prejudice the jury, citing **Corning v. Dollmeyer,** 123 Ill. App. 195, and **Hatcher v. Quincy H. Ry. Co.** 181 Ill. App. 34. In both of those cases, the injected matter had a direct bearing upon other real issue in the case. In the Corning case, where the issue was whether Mrs. Dollmeyer, when in a closet would have been beyond the observation of Mrs. Corning upon her bed, and a trunk was near a door to which Mrs. Corning had testified her nurse, alone, had access, during her illness, and the plat showed the door, with the statement thereon: "Door always closed and locked opening into my room against my trunk," and in the Hatcher case the

question at issue was whether appellee got on the platform of the car or only upon the step. If she only got on the step, then not more than her face could be seen from the opposite side of the street, through the window of the car, while if she got upon the platform, then her head and shoulders could be seen through the window. The plat had many measurements marked upon it with various lines showing the levels or lines of vision from the curb, sidewalk and from certain elevations and this court held correctly that it was an endeavor to get before the jury the written testimony of the author of the plat, that it might take such written evidence to the jury room and is in the nature of a written argument upon the

oral testimony.

There is no doubt in this case but that the word "clear," was a part of the measurement of the driveway and that the draftsman had indicated that the driveway was twelve feet and two inches in the clear. The question as to the conditions at this point and what took place at this driveway, was in no manner a disputed question in this case and all the witnesses were agreed as to just what did take place at the driveway and appellant could not have been prejudiced by the admission of this plat in evidence, to which the only objection made was the general objection, that it was incompetent, improper and immaterial. **C. & E. G. R. R. Co. v. Wallace,** 202 Ill. 129; **Calumet Dock Co. v. Morawetz,** 195 id. 398; **Benefield v. Albert** 132 Ill. 665.

Some of the rulings of the court, on the admission of evidence, are criticised by appellant. For example, Edna Murfield was asked to state whether, after appellant had turned his car to the left, after going out into the road, there was sufficient room for her automobile to pass him on the left, and the answer was a mere conclusion. The appellee was permitted to testify that she exercised no control over the driver, which was a mere conclusion. However, the testimony of Edna Murfield fully shows all of the conditions under which the trip was

undertaken and that appellee was her guest, from the facts recited in her testimony. Dora Geiger was not permitted to testify that appellant kept his car on the oiled portion of the road, but she was permitted to state that he kept his car in the center of the road, where the evidence of all witnesses place the oiled portion of the road.

Some other criticisms are made on rulings of the court in

the admission of evidence, and without doubt some errors were made in this regard, none however, that we regard sufficiently prejudicial to warrant a reversal in this case.

Appellant assigns error on the court's refusal to give appellant's sixth and seventh instructions. Instruction number six is based upon the theory that if appellant reached the highway, at any time prior to the Murfield car reaching the highway, opposite the lane or driveway, extended, then appellant was entitled to the right of way and was within his rights in driving upon the highway ahead of the Murfield car. The instruction states specifically, what is not the law and the danger in travel, which the statute seeks to prevent. The law does not give the right of way to him, who can first obtain it, but to the driver from the right, and no driver at the left has the right to cross an intersection and take up a course of travel, in front of a vehicle going in the same direction except in those cases where a reasonable and prudent driver, using due care and caution, can cross such intersection and take his course on the highway, without endangering the life or limb of any person or his vehicle, traveling on the same course and in the same direction.

Instruction number seven is subject to the same criticism, but presents to the jury the theory of the driver using due care and caution **in making the turn,** across or around the intersection, but arriving at the course of travel ahead of the other car. The instruction ignores the question of the right of way. No such crossing could be with due car and caution, which interjected the car crossing immediately ahead of the car having the

right of way. Appellant objected that the court did not give his instruction number eight as to due care and caution to be exercised

by appellee, but it was mainly a duplicate of other instructions given and the jury was fully instructed as to the due care and caution appellee was required to exercise in her behalf.

On the motion for a new trial appellant presented the affidavits of two jurors, stating that in the jury room, pending consideration of the case, "it was stated by some juror that the Geiger car was insured and so it was generally understood by the jury that the defendant was insured against public liability in this case."

The affidavit of counsel was presented on motion for a new trial, showing that each one of the jurors on their voir dire had answered questions stating that he did not know the defendant and knew nothing concerning the case or the facts; that during the trial no one in the court suggested or intimated anything concerning the defendant carrying insurance. This objection is not raised to impeach the verdict of the jury, but is presented to show that a juryman, some juryman swore untruthfully on his voir dire and was therefore a prejudiced and disqualified juror. **West Chicago St. Ry. Co. v. Huhnke**, 82 Ill. App. 406.

The affidavits do not name the juryman that made this statement, neither do the affidavits purport to give the exact language used by the juror and for aught that appears, some juror may have made the statement as a conclusion, that the defendant was insured. This may be a conclusion to which many jurymen arrive, when nearly all jurymen and other citizens own cars and doubtless many carry insurance. There is no doubt but that the subject of insurance injected into a case of this nature goes far to prejudice the ordinary juryman in favor of plaintiff's cause. If such a statment had been injected into the case upon the trial, it would

have been promptly stricken by the trial court or the jury then and there discharged. But jurors cannot be permitted to impeach their verdicts, neither can the trial court test the truthfulness of jurors statements on their voir dire, unless their statements are fully before the court, and not then, unless some certain juror or jurors are specifically charged with making some certain statement and the substance at least of the contradictory language set out. It is not error to refuse to set aside a verdict, because some juror, unknown, we presume, to the affiants, has made a prejudicial statement in the jury room, possibly in the heat of debate, that may be a statement of fact or may be a statement of opinion or conclusion. Whether suitors in court do or do not carry insurance, is not an issue in this class of cases and is a subject highly improper to be taken into consideration by counsel, parties or jurors.

Finding no error in this record which in the judgment of this court is sufficent to warrant a reversal of the verdict and judgment, the judgment of the Circuit Court of McLean County is affirmed.

Affirmed.

General No. 7577 Agenda No. 21

October Term A. D. 1923

Faber-Musser Co., Appellee

vs.

Wm. E. Dee Company, Appellant

Appeal from Sangamon.

PER CURIAM.

In this case suit, was brought by Faber-Musser Co. the appellee, in the circuit court of Sangamon County, to recover damages for breach of an alleged contract with the William E. Dee Company, the appellant. The contract related to the purchase of a large quantity of fire brick and fire clay, amounting in the aggregate to about the sum of $18,000.00. On the first trial of the cause, the court directed a verdict for the William E. Dee Company, and rendered judgment in its favor; and this judgment was affirmed by this court on appeal; but a certificate of importance and appeal was granted to the Supreme Court. The Supreme Court reversed the judgment appealed from and remanded the cause, which was re-instated in the court below. Another trial was had which was by the court without the intervention of a jury; and on the second trial, the issues were found for the William E. Dee Company, and a judgment rendered in accordance with such finding; upon appeal to this court, the judgment was reversed and the cause remanded. This appeal is prosectued from the judgment entered on the last trial; and which was rendered in favor of the appellee, fixing the damages to be recovered at $12,042.35.

The main contested question in this controversy, concerns the matter of the agency of Mathew M. Dee, who as agent for the appellant company, accepted appellee's order for the fire brick and fire clay, which appellee claims to have purchased from the appellant; the agency of Mathew M. Dee is not controverted; but the extent of his agency is the point in controversy; and the question in dispute concerning his agency is, whether he was the general agent of the appellant, or merely a traveling

salesman who could only take orders for fire brick and fire clay subject to the approval of appellant. If Mathew M. Dee was the general agent of appellant in the business of the sale of appellant's brick products, then the acceptance by Mathew M. Dee of the order from appellee, of the fire brick and fire clay in question constituted a contract by appellant, and it was legally bound thereby. A finding that Mathew M. Dee at the time he accepted the appellee's order was the general agent of the appellant, is in effect a finding that the contract effectuated by the acceptance was the contract of appellant. The Supreme Court held that under the facts proven on the first trial the agency of Mathew M. Dee, was a general agency in the matter of the sale of appellant's products; and that such agency was a matter of legal inference from the facts proven. "Whether an agent has express authority to do a certain thing is a question of fact for the jury, but whether an implied authority arises from a certain state of facts is a question of law which should not be submitted to the jury." Faber-Musser Co. v. Dee Clay Co. 291 Ill. 240; Doggett v. Greene 254 Ill. 134. In the case referred to the Supreme court also says concerning the agency of Mathew M. Dee, as disclosed by the facts proven, that "There is no question on this record, as to the agency of Mathew M. Dee for the appellee company. The only question in that respect is, as to the extent of his agency, and under the authorities just cited, the letter heads used by appellee's agent at the Springfield office were admissible in evidence to show the extent of such agency. It is argued, that there is no evidence in the record tending to show that these letter heads were ever approved by the company; that they may have been gotten up for the purpose of satisfying the self pride of Mathew M. Dee, rather than with the sanction of the company. This suggestion seems without merit. It is fair to assume from this record that these letter heads were in general use; that the lettering on the office in Springfield also indicated, that the office was the western sales office of the company; that

these facts, in connection with the requirement of the statute, that the principal office of an Illinois corporation should be in this state, would fully justify any reasonable man in assuming that the person in charge of that office had full control and management of the business of sales for appellee. There is no evidence in any way tending to show that appellant's agent knew that the agent at Springfield was in any way limited in his authority as to any business transaction that he should enter into on behalf of appellee. Another fact which tends strongly to justify this conclusion is, that appellant wrote the first letter with reference to this order to William E. Dee, President, at the Springfield office, and this letter was answered there by Mathew M. Dee, who accepted the order here in dispute." The facts and circumstances which characterize Mathew M. Dee's agency as a general agency by legal inference, were substantially the same in the two trials which followed the decision of the Supreme Court. It is true that the appellant made proof of some additional facts which it claims had an important bearing upon the facts which the Supreme Court say justified the legal inference of a general agency. A proper consideration of these facts, however, does not bear out appellant's contention. One of the additional facts proven was that it had an office in Chicago, which was occupied by the president, where the director's meetings were held, where the president and vice president, and purchasing agent had desks; and where the corporate business of the company was apparently transacted; but the evidence does not show that the Chicago office had anything to do with the business of the company, in the matter of the sale of the company's products; and it does not appear to have been established for that purpose. The matter of making sales of the company's products was carried on in this state through the Springfield office, concerning which the president of the appellant company William E. Dee testified, as follows: "We established our Springfield office about 1910; Mathew Dee was our first representative and he continued his connection until the time of his death."

Appellant also introduced in evidence proof of a usage and custom in the brick trade generally, by which traveling salesmen merely solicited orders, and did not make contracts for their employers. These new facts do not very nor weaken the force of the facts and circumstances proven by appellee, which justified the legal inference of the general agency of Mathew M. Dee, and of his authority to accept the appellee's order. We are of opinion therefore, that the court properly found that the appellant was bound by the accepted order as its contract.

The other question which arises on this appeal concerns the measure of damages which appellee had a right to recover. The rule in that regard, applicable to this case as repeatedly announced by the courts of review in this state is, that the measure of damages is the difference between the contract price of the articles contracted for, and the market price at the time of the breach. Sleuter v. Wallbaum 45 Ill. 43; Phelps v. McGee 18 Ill. 155; Tribune Company v. Bradshaw 20 Ill. 17. In Sleuter v. Wallbaum the rule is clearly stated: "When the breach has occurred the other party has the right to treat the contract as rescinded, and to go into the market and purchase the article at its merchantable value; and he has a right to recover the difference in the price which he was thus compelled to pay, with interest on the difference which he has paid. But, to recover, it is not essential that he should purchase the article after the breach occurs; and, if he does not, then the true measure is the difference between the contract and the market price." And the definition of the rule is emphasized by the further statement. that "the only safe rule is to confine the measure of damages to the market price at the time of the breach." The evidence clearly shows, that the breach of the contract in this case occurred on May 16th, 1917, when the appellant repudiated the contract, by refusing to carry it into effect. It is true, that the appellee by correspondence and otherwise, made repeated efforts, after that time, and until June 9th following, to induce the appellant to reconsider its refusal

Wiggins v. Bell, 94 Ill. 223;

Under the contract referred to, appellant agreed to commence shipping the "straight bricks and shapes" within two weeks from the date appellant received specifications from the appellee, and to ship the "special shapes", which were to be made, not later than ninety days from the date appellant received the specifications on the entire order. The evidence shows that the appellant refused to supply the appellee with the bricks designated in the order because of the time fixed for the delivery of the brick called for by the contract. Appellee had the right in this situation to go into the open market at the time fixed for delivery and supply itself with the brick which appellant had failed to deliver under the contract at the market prices then prevailing. And the evidence tends to show that appellee did go into the market and purchase the brick embraced in the contract; it also shows the amounts paid for such brick by the appellee; but the evidence does not show that the amounts paid were the market prices at the time fixed for delivery. And it is clear from the evidence that there was a rise in the market prices of brick from time to time after the date of the contract; it was a material element therefore in the ascertainment of the amount of damages to establish what the market prices of the brick were at the time of the breach of the contract. In this state of the record, it is evident that the court did not have sufficient evidence as a legal basis for ascertaining the amount of damages; and that the amount of the damages fixed in the judgment was not determined in accordance with the rule referred to.

The judgment is therefore reversed, and the cause remanded.

General No. 7587 Agenda No. 3

October Term, A. D. 1923

Mike Smith, Appellee

vs.

Illinois Central R. R. Co., Appellant

Appeal from Sangamon.

PER CURIAM.

In July 10, 1923 we filed the following opinion in this case:

"This was a suit for trespass and assault, arising out of the shooting of appellee in the leg by a watchman for appellant.

Appellant pleaded not guilty, and a plea that the watchman acted in justifiable self-defense, and wounded appellee by accident, when shooting toward the ground to scare appellee.

There were two trials before a jury, the first resulting in a disagreement by the jury, and the second resulting in a vedict and judgment for $1,100.00, in favor of appellee, which appellant seeks to reverse with judgment in this Court in favor of appellant.

The issue involved in this appeal is the action of the trial court in refusing to direct a verdict for appellant, and in entering judgment on the verdict.

The only witnesses to the shooting are appellee and the watchman, named Harold Dodd.

Appellee says in substance:—that he is an Austrian, forty years old, weighing 175 pounds, sixteen years in this country, not naturalized, and has been making his headquarters

about St. Louis, Missouri, for a dozen years; that he had no steady occupation, but travelled from place to place, working as a laborer on construction jobs until he gathered a little money; and then returning to St. Louis until his money was gone; that he traveled by beating his way on freight trains; that sometime in August, 1921, he learned that a foreman named Frank Kelly

was in charge of construction work for the Illinois Central Railroad at Clinton, Illinois, and on August, 1922, in company with a man he calls Jack, he boarded a freight train of the Chicago and Alton at St. Louis and rode on it to Girard, Illinois; that the next day he took another freight train to Springfield on the Chicago and Alton; that he reached Springfield in the afternoon of August 23rd, about four o'clock and walked at once from the Chicago and Alton yards out to the Sangamon mine, about two miles east of the center of Springfield alongside of the freight yards of the Illinois Central; that he stayed there until about midnight when an Illinois Central freight came in, destined for Clinton, and started to leave; that he and his companion then walked southwest along a path, outside the railroad property, keeping off the rail road property, looking for a car in which to steal a ride to Clinton; that he saw an empty car and turned toward the right of way to get on it, when the watchman Dodd, shouted at him, and appellee stopped, still outside the railroad property; that the train was then moving out; that Dodd asked what they were after; that appellee's companion ran at once; that appellee stood, and replied that he wanted to go to Clinton to work for Frank Kelly; that the watchman said, "Get out of here, quick, you can't go on the train," and appellee answered, that if he couldn't ride he would walk; that immediately Dodd shot; that during this conversation and at the instant of the shooting appellee stood facing Dodd, his hands folded in front of him; that his voice was quiet and he spoke in a friendly way; that he made no move to threaten Dodd; that he was not

interfering with Dodd nor with the company property, and he made no move toward the right of way, and did not intend to when Dodd forbid it; that while they stood, talking thus quietly, Dodd shot appellee in the leg; that appellee did not know why he was shot; that he had not said, nor looked, nor done, nor tried to do anything to anger Dodd or to interfere with him

or his business; that after shooting him, Dodd put a revolver close to him and said, "I'll teach you to rob cars."

Dodd's statement is that he had been employed since November, 1920, as a watchman by appellant, going into that employment after leaving the military service of the United States; that his duty was to patrol the yards east of East Grand Avenue, Springfield, at night; that the place was very lonely and desolate, no highway being within a quarter of a mile of it in any direction; that he had been stoned by unknown persons while on duty, before August 23, 1921, and twice he had been shot by unknown persons; that no one came to these yards at night except trainmen, thieves and tramps; that after he had been shot at he went of his own motion, without the knowledge of his superiors, to the authorities of the City of Springfield to secure a commission as police officer, that he might carry a revolver for his own protection; that this was in June 1921; that he had not been directed by his superiors nor appellant to carry any weapon and they did not know he had any weapon; that on the night of August 23, 1921, about midnight, Dodd in going around the freight train just starting to move for Clinton, came upon appellee and his companion alongside the train; that one of them had his hand up where the seal on the door should be, as if to reach the seal; that it was a clear moonlight night; that he asked what they were doing; that both men ran away from the track; that one ran away entirely, but appellee just left the right of way; that appellee moved

20 or 30 feet from the train and stopped; that Dodd asked again what he was doing, and appellee replied, "None of your God damn business:" that he turned toward Dodd and pushed back his raincoat as though reaching for a gun; that appellee appeared to weight 200 pounds or more, had on a month's beard, and spoke with a tough, rough voice; that his entire manner and appearance were tough and aggressive; that Dodd

thinking himself in serious danger, intending to hit the ground, and to scare appellee out of his apparent intention to shoot Dodd; that at the time he shot appellee he was following instructions of his employer to keep them off the right of way and that he was also there to keep men from breaking into the train.

Appellant insists that the shooting of appellee by Dodd was not within the scope of Dodd's authority from appellant and that the shooting, by either the account of Dodd or the account of appellee, was from personal motives not arising out of anything being done or attempted, for or against the appellant, Illinois Central Railroad Company, at the time of the shooting.

A master is liable only for those acts of his servant done in the business of the master and within the scope of his employment. Even though an act is in excess of powers conferred on the servant, the master is liable if the servant is engaged in the performance of his duty to the company and about its business. C. B. & Q. R. R. Co. vs. Sykes, 96 Ill. 162.

Whether or not at the time of the shooting Dodd was acting within the scope of his employment was a question of fact to be determined from the evidence. Where a motion is made to direct the verdict upon the trial of an issue, the party against whom the motion is directed is entitled to the benefit of all the evidence in his favor in its most favorable aspect to him,

and of all presumptions that may be reasonably drawn from such evidence. The evidence is not weighed and all contradictory evidence or explanatory circumstances must be rejected. Yess vs. Yess, 255 Ill. 414; McCune vs. Reynolds 288 Ill. 188. Applying this rule to the present case we are of the opinion that the Court did not err in refusing to direct a verdict for appellant.

The judgment is affirmed.

On October 2, 1923, a rehearing was granted.

Upon reconsideration of the case we adhere to the views expressed in the former opinion and it is, therefor, ordered refiled as the opinion in this case.

The judgment is affirmed.

General No. 7645 Agenda No. 26

October Term, A. D. 1923

W. A. Colyer, Appellee

vs.

Walter B. Shannon and Doster Shannon, Appellants

Appeal from the Circuit Court of Douglas County, Illinois.

PER CURIAM.

In this case an appeal is prosecuted from a judgment of the Circuit Court of Douglas County; which judgment is based upon the verdict of a jury.

The abstract filed by the appellants does not show what the verdict of the jury was; nor whether the issues involved were found in favor of the appellee or the appellants; and it does not state what the judgment was; nor against whom it was rendered; nor for what amounts. The abstract is obviously insufficient and incomplete concerning matters which are vital in a proper consideration of this case on appeal; and it does not comply with the requirements of Rule 22 of this Court.

In accordance with the established practice the judgment is therefore affirmed. **(Defording v. Cen. Ill. Service Co.** 223 Ill. App. 374.)

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As in the case cited however we have nevertheless considered the questions raised in appellant's brief, and are of the opinion that there is no reversible error in the case.

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General No. 7638. Agenda No. 19

October Term, A. D. 1923.

Ray Chavis, Will S. Stewart, Co-Partners as Stewart & Chavis, Appellees,

vs.

William T. Hartz, Appellant.

Appeal from Vermilion.

Heard, P. J.

This is an appeal from a judgment in favor of Appellees against Appellant, in an action of forcible detainer, brought by Appellees against Appellant to recover the possession of certain premises in the city of Danville.

On August 26th, 1921, J. O. Faris, the owner of the premises in question, made a written lease thereof to Appellant for a term commencing October 1, 1921 and ending on September 30, 1924. This lease was made in duplicate, one being retained by Faris and one by Appellant. The one retained by Faris shows the following provision:

"That party of the first part shall have and is hereby granted the right and privilege of terminating, without cause, this lease at any time hereafter during said term, or any extension or continuation thereof, by giving to party of the second part sixty days written notice to quit; such notice may be given at any time and party of the second part shall quitsaid premises not more than sixty days after the date of giving said notice, regardless of the date of this lease, or of the other terms thereof; said notice may be given and the proof of the service thereof may be made in the same manner as is provided in the Statutes of Illinois, covering Landlords and Tenants."

There is a controversy as to whether or not this provision had been erased from the one retained by Appell-

ant prior to the execution of the lease.

On September 28, 1922, Faris made a written lease to Appellees for the premises in question and other adjoining premises for a term commencing October 1, 1922 and ending on October 1, 1931. December 1, 1922, the following paper was served on Appellant:

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"To William T. Hartz,

Danville, Illinois.

YOU WILL PLEASE TO TAKE NOTICE THAT I have elected to determine the Lease of the premises you now hold of me as my tenant, And, you are hereby required to quit and deliver up, on the 1st day of February, A. D. 1922, the possession of the Whole of the premises which you now hold of me, situated in the City of Danville in the County of Vermilion and State of Illinois, more fully described as follows: The --------of the ---------- at No. ---------- St., otherwise described as ---------- Lot ---------- Block----------.

The first Floor and Basement of the premises known as 216 East North Street Also the First Floor and Basement of the Store Room known as No. 40 Washington Avenue and the Basement under the Store Room known as 42 Washington Avenue Also Barn on said premises.

Yours respectfully,

Signed R. H. Chavis, Landlord

By Will S. Stewart, Agent.

Dated at Danville, Illinois, this 1st day of December, A. D. 1922."

If it be admitted, as claimed by Appellees that the sixty day clause was contained in the lease as originally executed by the parties and that Appellees by virtue of their lease from Faris had a right to terminate Appellant's lease by giving him 60 days notice, upon neither of which questions do we deem it necessary to pass. The paper in question served upon Appellant, December 1,

1922 in no wise fulfills the repuirments of the agreement. It is not signed by Appellees, but is signed "R. H. Chavis, Landlord, by Will S. Stewart, Agent." It did not give Appellant sixty days written notice to quit, but notified him to quit and deliver up the premises February 1st 1922, a time nine months prior to the time of given notice.

It is contended by Appellees that these specific questions are raised in this court for the first time and that therefore, cannot be considered by us. In the court below, Appellant entered a motion for a new trial and a motion in arrest of judgment. The motion for a new trial raises the question as to whether the verdict of the jury was contrary to the evidence in the case or contrary to the law. The evidence showing that the notice which was the basis of the suit was defective, the verdict was therefore, contrary to the law and to the

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evidence in the case, and this motion sufficiently raised the question of the sufficiency of the notice in the court below. (Hazel v. Hoopestown Bus Co., Supreme Court opinion, filed Oct. 1923.) The judgment being contrary to the law and the evidence, it must be reversed.

Finding of facts we find that Appellant was not given sixty days written notice to quit the premises for which suit was brought.

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General No. 7647. Agenda No. 28.

October Term, A. D. 1923.

W. S. Logan, Appellee.

vs.

W. C. McBride, Incorporated, Appellant.

Appeal from Edgar.

Heard, P. J.

On the 4th of February, 1922, Appellant who had oil leases on several farms in Edgar County, Illinois, entered into a written agreement with Appellee, who was the owner of certain pipe, casing and other oil or gas well equipment which was then upon the premises under lease to Appellant. This agreement is as follows: "THIS ARGEEMENT made and entered into this 4th day of February, 1922, by and between W. S. Logan, of Paris, party of the first part, and W. C. McBride, Incorporated, of St. Louis, Missouri, party of the second part, WITNESSETH:

WHEREAS, the said first party is the owner of certain pipe, casing and other oil or gas well equipment situated on the following described premises: on part of n½ of Sec. 24, Town 14, Range 14, owned by E. N. Blair, and on part of Sec. 13, Town 14, Range 14, owned by Forcum & Brewer, all in Edgar county, state of Illinois.

AND WHEREAS, the said first party is desirous of selling part or all of the above equipment at $2,000 and whereas the said second party is desirous of buying all or part of the above equipment, if after certain investigations and tests they intend making it is deemed advisable.

NOW, THEREFORE, WITNESSETH, for and in consideration of the sum of One Dollar ($1.00), the receipt of which is hereby acknowledged, first party hereby grants the second party the privilege and right to use

any and all of the above equipment for a period of 120 days without any obligation or liability attaching to said second party other than the actual damage done to said equipment, ordinary and tear excepted.

Witness our hands and seals this 4th day of February, 1922."

After the expiration of 120 days Appellant used a small portion of the machinery for a few days and then left it all, except

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about ninety two feet of two-inch tubing upon the premises where Appellant had originally found it. Appellant offered to pay for this tubing, but Appellee would not accept payment, claiming that Appellant must pay him the sum of $2000 for the machinery, and brought this suit in assumpsit for the recovery of such sum.

The declaration consisted of the common counts, to which Appellant plead the general issue. A trial resulted in a judgment of $1426 in favor of Appellee against Appellant from which judgment this appeal has been prosecuted.

Appellee contends that there was conditional sale of the material and that Appellant purchased it with the right to take and use it for 120 days, with a right to return it at the end of that period or to keep and pay for it just as they desired. The parties having entered into a written Contract, their prior negotiations became merged in a written Contract, the terms of the written Contract must govern. This Contract is not an option Contract, nor is it a Contract of conditional sale, but is merely a license or leave to use the property and did not bind Appellant in any way to purchase the same.

The Judgment of the circuit court is therefore erroneous and the judgment is reversed and the cause remanded.

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General No. 7655 Agenda No. 67

October Term, A. D. 1923.

D. S. Anderson, et al., Appellees

vs.

Pan American Motors Corporation, et al.

Frederic W. Lincoln, John R. Bradlee and Charles E. Barry, copartners doing business under the firm name and style of Henry W. Peabody & Co., Appellants

vs.

Edward Danner and the Millikin Trust Company, as Receivers of Pan American Motors Corporation, Appellees

Appeal from Macon.

Heard, P. J.

A bill in chancery was filed by certain stockholders of the Pan American Motors Corporation (hereinafter called the defendant) praying for the dissolution of the corporation, for the appointment of a receiver therefor, and for the marshalling and distribution of its assets. Appellees, Edward Danner and the Millikin Trust Company, were appointed receivers, a decree was rendered in accordance with the prayer of the bill, and an order was entered requiring all claimants to file their claims against the defendant within a time fixed by the court. Appellants (hereinfater referred to as claimants) Frederick W. Lincoln, John R. Bradlee and Charles E. Barry, co-partners doing business under the firm name and style of Henry W. Peabody & Company, filed their claim in due course. Pursuant to order of court, claimants thereafter filed an amended claim for damages arising out of the breach by defendant of an alleged contract whereby claimants claimed the sole and exclusive right to sell in New Zealand automobiles of defendant's manufacture; ceivers having objected to the allowance of the claim, it was referred to the master in chancery for proof and con-

clusions.

The master in his report found that the claimants are co-part-

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ners doing business as Henry W. Peabody & Company with their principal office in the city of New York and with branch offices in Sydney, Australia, Wellington, New Zealand, and other places throughout the world; that on December 24, 1919, and since that time claimants were and have been engaged in the business of exporting and importing goods and merchandise from and to different countries; that the claim is for damages sustained by claimants because of a breach of an exclusive sales contract entered into between claimants and the defendant whereby in consideration of the purchase of certain automobiles by claimants from the defendant for resale in New Zealand, the defendant gave claimants the exclusive right to sell and market in the territory of New Zaland automobiles of defendant's manufacture; that on January 2, 1920, claimants placed with defendant through W. P. Arthur, manager of defendant's export department, an order for three automobiles for shipment to New Zealand at the list price of $2,000 less 25 per cent, each of said automobiles to have certain special equipment and also spare parts to the value of $50 per automobile; in said order it was provided: "Above order carries option for us of agency for New Zealand for a period of 60 days after arrival of cars at foreign ports;" that the order was accepted by the defendant and on May 4, 1920, it was filled by the shipment from defendant's factory at Decatur, Illinois, of said automobiles for delivery to claimants; that claimants paid the defendant for said automobiles, including expenses of shipment, the sum of $5,240.46 on May 8, 1920 and the automobile on arrival at New York were shipped by claimants to John Hooton at Wellington, New Zealand, and in due

course arrived at said destination; that these three automobiles were purchased by claimants for resale to said John Hooton of Wellington, New Zealand, and they were resold to him by claimants at a profit of 2½ per cent on the purchase price to claimants; after the sale of these automobiles to Hooton by claimants, he placed an order with claimants, through their Sydney, Australia office for 34 automobiles of the same manufacture and on March 22, 1920, claimants placed with defendant through W. P. Arthur, manager of defendant's

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export department, orders for 16 automobiles, the same to be shipped by defendant four each month beginning in March, 1920; that on April 8, 1920, claimants placed a further order with defendant through said Arthur for 18 automobiles; that at the same time claimants also ordered $500 worth of spare parts. All of said orders were signed in the following manner: "John Hooton, Esq., Wellington, New Zealand, by Henry W. Peabody & Company, Agents;" that on or shortly after the date said orders were given, they were accepted by defendant and the sale thereon was made by defendant to claimants and not to Hooton; that on August 24, 1920, defendant shipped from its factory in Decatur, Illinois, to claimants, six of the automobiles so ordered and on or about August 28, 1920, received payment therefor at the rate of $2,450 per automobile less 25 per cent and also received payment for extra parts shipped with said cars, the total payment, including cost of boxing and freight charges to New York, being $12,-514.20; that on or about September 25, 1920, claimants shipped said six automobiles to said Hooton at Wellington, New Zealand, by ocean steamer; that on October 6, 1920, defendant shipped to claimants on said orders three automobiles and on or about October 8th received payment therefor at the list price of $2,450 per automobile

less 25 per cent and also received payment for extra parts, cost of boxing and freight, a total sum of $6,796.73. On or about November 4, 1920, claimants shipped these three automobiles by ocean steamer to Hooton at Wellington and no further shipments on said orders were made by defendant; that the orders for automobiles of March 22, 1920 and April 8, 1920, were given by claimants and accepted by defendant before the three automobiles purchased on the first order had arrived at Wellington, New Zealand, and before they had been shipped from the factory of defendant; said automobiles were sold to claimants with the knowledge on the part of defendant that they were purchased for resale in New Zealand and as part of the consideration for the giving of the orders for said automobiles shipped by defendant on said orders, claimants were granted the exclusive agency in all the territory of New Zealand for the sale of automobiles manufactured by defendant; that said exclusive

agency began on the date of the giving of the first of said orders, i. e., January 2, 1920, and was to be in force and effect for a reasonable time after the making of the last shipment of automobiles on orders given by claimants and accepted by defendant for shipment to New Zealand; that on August 7, 1920, defendant, acting by and through W. P. Arthur, manager of its export department, entered into a written agreement with the International Motors Company of Auckland, New Zealand, in and by which the defendant contracted to sell to said International Motors Company 36 automobiles to be delivered at the rate of three automobiles per month beginning January, 1921, at the list price of $2,450 per automobile, less 25 per cent, and in said written agreement it was also provided that none of said 36 automobiles so ordered by said International Motors Company should be sold outside the terri-

tory of New Zealand; that defendant in pursuance of said contract shipped three automobiles to said International Motors Company at Auckland, New Zealand, by ocean steamer leaving New York on or about October 2, 1920, and received payment therefor as per the terms of said contact; that these automobiles were in due course delivered to the Internaional Motors Company at their destination; that no further shipments were made under said contracts with the International Motors Company and the contract was, sometime prior to December 13, 1920, cancelled; that said Hooton refused delivery of the automobiles purchased by claimants and delivered by defendant under the orders dated March 22, 1920 and April 8, 1920, when the same arrived at Wellington, New Zealand, and refused to pay for them, and alleged for such refusal that the defendant had given to one Abbot's Motors of Auckland, New Zealand, the agency for its cars; that the International Motors Company had negotiated for the sale to said Abbotts Motors of Auckland, New Zealand, of the automobiles contracted to be purchased by it; that the nine automobiles purchased by claimants, delivery of which was refused by said Hooton upon arrival at Wellington, New Zealand, were shipped from Wellington by claimants to Sydney, Australia, and were there sold by claimants; that claimants endeavored to sell said nine

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automobiles in New Zealand and were unsuccessful in finding a market for the same in said territory; that all of the cars were sold by cliamants at Sydney, Australia, between August 5, 1922 and October 31, 1922, for the average price of $1,961.49 each, which was the reasonable, fair market value of said automobiles at the time sold; the cost per car to claimants of said automobiles delivered at Wellington, New Zealand, (including purchase price, all charges of transportation and insur-

ance) was $2,384.27, and claimants paid for freight from New Zealand to Sydney, Australia, on said automobiles and for cartage, wharfage, fire insurance, repairs, storage, duty and commissions on sales, a total of $9,893.10, or an average of $1,099.23 per car, making the total cost of claimants, including freight, insurance, cartage, storage and all necessary expenses until sold $3,483.50 per car.

The master then found from the foregoing facts that the entering by defendant into said contract with the International Motors Company and the sale of cars to said International Motors Company for delivery in New Zealand was a breach of the exclusive agency or sales contract of defendant with claimants and further found that the measure of damages sustained by claimants was the difference between $10,440.50, the average cost to claimants of three cars, including freight, insurance, storage and other expenses, and $5,884.47, the average amount realized from the sale of three cars at Sydney; that is that claimants sustained a loss of $4,556.03 "by reason of being deprived of the market for three cars in New Zealand" through the sale by the defendant to said International Motors Company of three automobiles in violation of the exclusive sales agreement with claimants.

The receivers filed objections to the master's findings that, among other things, an exclusive agency for the sale of its automobiles in New Zealand had been granted by defendant to claimants; that there had been a breach of such agency or sales contract as a result of which claimants had been damaged as found; that the claim had been allowed by the master in the sum of $4,556.03 and that the claim had not been disallowed with costs.

All objections to the report were overruled by the master

and by agreement of counsel, such objections were ordered to stand as exceptions to the report. These exceptions were then argued orally before the chancellor who ultimately ruled that the exceptions of the claimants should be overruled and that those exceptions of the receivers which are set forth above should be sustained. Pursuant to this decision of the court, an order was entered disallowing the claim in its entirety with costs to the defendant and further allowing claimants an appeal to this court, which has been perfected.

It is the contention of claimants, that a contract existed between claimants and defendant by which claimants were given the exclusive agency for the marketing in New Zealand of the cars purchased by them from the defendant; that this contract of exclusive agency began on January 2, 1920, the date of the giving of the first of said orders; that the defendant violated the contract of exclusive agency and that therefore claimants are entitled to be reimbursed for the loss they suffered by reason of such breach of contract. This position of claimants is not tenable. The orders for the automobiles given on January 2, 1920, did not constitute a contract for an exclusive agency, neither did they purport to contain such contract. The language in the orders upon which claimants rely is "Above order carries option for us for agency for New Zealand for a period of 60 days after the arrival of cars at foreign ports." A option for an exclusive agency is not a contract for an exclusive agency. In Ide v. Leiser, 24 Pac. 695, in distinguishing between an option for sale and a contract for sale, the Supreme Court of Montana said: "There may be (1) a sale of lands; (2) an agreement to sell lands; and (3) what is popularly called an 'option.' The first is the actual transfer of the title from grantor to grantee by appropriate instrument of conveyance. The second is a contract to be performed in the future, and if fulfilled results in a sale. It is a pre-

liminary to a sale, and is not the sale. Breaches, rescission or release may occur by which the contemplated sale never takes place. The third,

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an otpion, originally is nither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not then agree to sell it; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets, **in praesenti,** not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy. That which the second party receives is of value, and in times of rapid inflations of prices, perhaps of great value. A contract must be supported by a consideration, whether it be the actual sale of lands, an agreement to sell lands, or the actual sale of the right to demand the conveyance of lands. A present conveyance of lands is an executed contract. An agreement to sell is an executory contract. The sale of an option is an executed contract; that is to say the lands are not sold; the contract is not executed as to them; but the option is as completely sold and transferred **in praesenti** as a piece of personal property instantly delivered on payment of the price. Now this option, this article of value and of commerce, must have a consideration to support its sale. As it is distance from a sale of lands, or an agreement to sell lands, so its consideration must be distinct; although, if a sale of the

lands afterwards follows the option, the consideration for the option may be agreed to be applied, and often is, as a part payment on the price of the land." This case is cited with approval in Carr v. Butterworth, 219 Ill. App. 14.

That the giving of such orders and their acceptance and the shipment of the automobiles did not constitute a contract for an exclusive agency for the sale of such automobiles in New Zealand is manifest

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by the fact that on January 2, 1920, the same date upon which the orders in question were given by claimaints to defendant, claimants wrote defendant a letter in which they said: "Referring to telephone conversation of today, we are sending you our order covering 3 touring cars for shipment to, one each, Auckland, Wellington and Lyttleton, New Zealand. We understand that this order for three cars carries the option for us of the agency for New Zealand for a period of sixty days after the arrival of the cars at the New Zealand port, within which time a definite agency agreement is to be made." It is evident from this language that claimants did not then consider that they had a contract for an exclusive agency, but only an option which they might exercise or not at their will within a period of 60 days after the arrival of the cars at the New Zealand port and that after such option was exercised by them that then a definite agency agreement was to be made by the parties. In Wurn v. Berksen, 309 Ill. 520, it is said: "It is also the rule that transactions between the parties after the execution of a contract had in reference thereto may be considered in determining the true intention of the parties concerning matters wherein the contract is not clear. It is well settled that the construction placed upon uncertain language of a contract by the parties themselves is of great weight in determining

the true construction of that contract." It is evident that claimants did not consider that they had obtained a contract for the exclusive agency of New Zealand either by the orders of January 2, 1920 or by the subsequent order of the 34 cars, for the reason that on November 30, 1920, claimaints wrote defendant with reference to these orders in part as follows: "This order was placed with you with the understanding that your execution of this order carried with it the option of the agency for all of New Zealand for a period of 60 days after arrival of goods in New Zealand. Cars covered by this order left your factory on the 4th day of May and cleared New York on the 7th of August, arriving in Wellington, N. Z. on the 8th of November. Accordingly therefore, the option of agency which you extended to us was good until the 8th

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of January, 1921."

The negotiations by the parties with reference to this contract were carried on largely by W. F. Goulding, representing claimants, and W. P. Arthur, who was the head of the Export Department of defendant at New York. On December 5th, 1920, they had a conversation with reference to which Mr. Goulding on behalf of claimants testified, that in that conversation Arthur told him that no one else was auhorized to act in New Zealand besides themselves and that the option they held "wou'd be extended as long as we want it and that the orders already placed constitute the basis on which he was ready to close the New Zealand agency for Mr. Hooton," and that in that conversation Goulding told Arthur that claimants had given the same option to Mr. Hooton, that they had received from defendant. On that same day Goulding wrote defendant on behalf of claimants a letter in which it was stated: "We also understand that the orders as covered by our folios 118-220 AS 75 constituted

a favorable basis upon which you were willing to close the agency for New Zealand, and that in accepting and executing a portion of these orders you considered this territory as closed although no formal agency agreement had been entered into. We understand that at the present time you are agreeable to formally closing your agency for New Zealand on the strength of these orders.

As advised, we will today be cabling our Sydney office to the effect that the Pan-American Motors Corp. does not know the Abbott Motors Corp. of Auckland, nor recognize them as their agents. Further advising them that you have made no other arrangements for this New Zealand territory except with us and that the execution of our order folios 224 AS 71 gave us the option of agency for this territory for a period of 60 days after arival of the goods, and that we have now arranged to extend the option of this agency indefinitely so that there may be an opportunity given to enter into formal agency agreement on the basis of orders already entered." The evidence further shows that while after January 1, 1921, efforts were made by claimants to arrive at some definite arrangement with defendant, such efforts

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were futil as is evidenced by claimants letter of January 19, 1921, in which they say "Referring to the matter of New Zealand agency as put before you in our letter of January 5th, we must advise you that owing to your failure to keep appointments made with the writer to discuss the position in New Zealand and due to the impossibility of getting in touch with you by the several calls which the writer has made at your office, that , unless we immediately get some undertaking from you as to what you are prepared to do in working out this problem, we must cease to consider your interests in this matter."

There is no evidence in the record that any contract

for an exclusive agency for the sale of defendant's automobiles in New Zealand was ever entered into by the parties. The only evidence in the case which would even tend to the conclusion that there was such contract, was some evidence as to the custom and method of automobile dealers in Australia and New Zealand as to agency contracts, which evidence was clearly incompetent and could in no wise be binding upon defendant. We are of the opinion that the evidence having failed to show such contract, the court was correct in sustaining the exceptions to the master's report and in entering its order disallowing claimants claim. The judgment of the Circuit Court is affirmed.

General No. 7658. Agenda No. 37.

October Term, A. D. 1923.

Vera Bunnell, Appellee

vs.

Harry M. Bunnell, Appellant.

Appeal from Adams.

Heard, P. J.

Vera Bunnell, Appellee, and Harry M. Bunnell, Appellant were married September 29, 1915 at Filley, Missouri. They lived in different parts of the state of Missouri, staying at any one place but a short time, until about the first of the year 1920, when they moved to a farm near Augusta, Illinois, at which place they remained until September 1921 when by reason of Appellant's poor health and the necessity for Appellee to procure a means of livelihood, they sold out their effects and Appellee went to Quincy and entered a school there for the study of bookkeeping and shorthand, returning to Augusta for the week ends. On January 2, 1922, Appellee left Appellant declining to have further martial relations with him. Thereafter she commenced this suit for divorce.

Complainant's bill of complaint, set out that Appellee and Appellant were married and that one child was born as the result of said marriage. The bill set out that Appellant, ever since said marriage has been guilty of extreme and repeated cruelty and set out divers specific acts of cruelty. Complainant in her bill prayed for a divorce and for the care, custody and control of the minor child.

Appellant answered the bill denying the acts of cruelty and alleged that Appellee left him without any reasonable cause or excuse therefor.

The court after hearing the evidence, entered a de-

dree finding that Appellant had been guilty of repeated and extreme cruelty toward Appellee, granting her a divorce and giving the custody of the minor child in part to Appellee and part to Appellant.

It is claimed by Appellant that the decree is contrary to the evidence in the case and that the evidence does not show that Appellant was guilty of any of the specific acts of cruelty alleged against him.

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As is usual in this class of cases, the testimony was very conflicting. Appellee testified to a state of facts which, if true, proved that Appellant was guilty of all the acts of cruelty alleged against him. While he specifically denied these acts of cruelty and the burden of proof rested upon Appellee. The question involved was purely a question of fact for the court. No good purpose would be subserved, in this opinion, by going into the evidence in detail. Suffice it is to say, the court who saw and heard the witnesses and who could observe their manner and appearance and was thus afforded better facilities for determining the creditability of the witnesses, found in favor of Appellee and we would not be justified in reversing that finding, unless the finding was clearly and manifestly against the weight of the evidence, which was not the case here.

It is contended by Appellant that the father is the natural guardian of the minor child and that he is in law entitled to the custody of the child and cites many authorities in support of this contention. But an examination of those authorities show they were cases arising between the father and third person where the mother was dead, or cases which were decided under the law as enacted by statute prior to July 1st, 1901, which law provided that the father of the minor, if living, and in case of his death, the mother, they being respectively competent to transact their own business, and fit persons,

shall be entitled to the custody of the person of the minor and the care of his education.

In 1901, Section 4 of the Guardian and Ward Act of this state was amended so as to read as follows:

"The guardian of a minor shall have, under the direction of the court, the custody, nurture and tuition of his ward, and the care and management of his estate; but the parents of the minor, if living, and in case of the death of either of the parents, the surviving parent. they being respectively competent to transact their own business, and fit persons, shall be entitled to the custody of the person of the minor and the direction of his education. The parents of a minor shall have equal powers, rights and duties con

cerning the minor. In case the father and mother live apart, the court may, for good reason, award the custody and education of the minor to either parent or to some other person. Whenever any person or persons make a settlement upon or provision for the support or education of any minor child, it shall be competent for the court, in case either the father or the mother of such child be dead, to make such order in relation to the visitation of such minor child by the person or persons so making such settlement or provision as shall to the court seem meet and proper."

Since this amendment, both parents have equal rights to the care, custody and control of the minor child and in every case where a dispute arises between the husband and wife as to such care, custody and control, it is for the court to determine from the evidence in the case as to the ability of the parties, their character, fitness and all the other facts and circumstances in evidence as to which of the parents is best fitted to have such care, custody and control, keeping in mind at all

times what is for the best interest of such child, and may give the custody to either one of the parents, or to one of them a portion of the time, and to the other, a portion of the time. This is a matter which rests largely in the discretion of the court and we do not think that such discretion was abuses in the present case.

Finding no reversible errors in the record, the decree of the circuit court will be affirmed.

General No. 7664 Agenda No. 70

October Term, A. D. 1923.

J. A. Oberman and M. S. Oberman, who sue for the use of First National Bank of Springfield, Appellees

vs.

Camden Fire Insurance Association, a Corporation Appellant

Appeal from Sangamon.

Heard, P. J.

On Saturday, February 12, 1922, a stock of goods consisting of shoes, gents furnishing goods, clothing and other merchandise belonging to J. A. Oberman and M. S. Oberman situated at Danville, Illinois, was almost entirely destroyed by fire.

At the time of the fire the Oberman's had fifteen policies of insurance aggregating $38,000. After the fire, an adjustor acting for all of the insurance companies examined the loss and the books and papers of the Oberman's and assisted in the making up of a proof of loss to be submitted by them to the various insurance companies for their action, at the same time informing them that he had no authority to bind the insurance companies to pay anything. At this state in the progress of the adjustment and settlement of the loss by all the companies, the fire marshal of the State of Illinois by letter desired the adjustment to be held up until he had completed an investigation of the circumstances of the fire. Six of the insurance companies thereupon refused to make settlement and three of them who had issued and delivered to the Oberman's as payees, their conditional drafts, stopped payment thereon. Three suits were brought by the Oberman's against three of the insurance companies. The Oberman's, as payees of the drafts indorsed and delivered them to the First National Bank of Springfield as collateral security for a debt and the bank brought three suits against the makers of the drafts. The three Oberman cases were tried as com-

[illegible] No. [illegible] [illegible] No. [illegible]

[illegible] Term, A. D. [illegible]

L. A. Oberman and M. S. Oberman, who are for the use of First National Bank of Springfield, Appellees

v.

Farmers Fire Insurance Association, a Corporation, Appellant

[illegible] [illegible]

[illegible] P. J.

[illegible]

panion cases and the three bank cases were also tried as companion cases and by stipulation the evidence in each class of cases was admitted in each of the other cases so far as applicable.

This case was one of the three suits begun by the First National Bank of Springfield as plaintiff against the appellant and the two other insurance companies as defendants upon so called drafts. The declaration

consisted of the common counts and a special count which alleged in substance that the drafts were executed and delivered to the Obermans by Appellant and were thereafter negotiated for value to the plaintiff bank by indorsement and delivery and the bank was the owner thereof.

The defendant filed the general issue and special pleas setting up the following defenses:

(a) That the instruments sued on were not drafts, or bills of exchange, but were non-negotiable choses in action, and that the bank was not the holder thereof in due course before maturity for value and without notice.

This defense was introduced in each of the special pleas.

(b) That the defendant being therefor in a position to make the same defenses against the bank as against the Oberman's, claimed that the issue of the instruments by the Insurance Company was procured through a fraudulent over valuation of the property damaged;

(c) That such issue was further procured by false swearing;

(d) That such issue was further procured by fraudulent concealment of property not damaged or destroyed and not upon the premises at the time of the fire;

(e) That the policies of insurance upon which the issue of such instruments was procured, were rendered void by the act of the Oberman's in violating the prohibition against keeping gasoline on the premises except-

ing in a tight and securely closed metal can, free from leak.

The plaintiff replied double to the pleas under leave of Court, denying the allegations of the special pleas.

When the cause came on for trial a stipulation was entered into between counsel that the three cases brought by the First National Bank of Springfield (hereinafter referred to as the "bank") against the Camden Fire Insurance Association, the Firemen's Insurance Company of New Jersey and the Milwaukee Mechanics Insurance Co., respectively should be tried together by trial of the cas against Appellant only and that the evidence there introduced should stand as if taken in the other cases.

A jury was waived and the case submitted to the Court for trial. The plaintiff offered in evidence the two so-called drafts, with the attached receipts, and also the policies of insurance issued by the

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defendant. Plaintiff then called Mr. Easley, a vice-president of the bank who testified that the bank received the instruments in question from J. A. & M. S. Oberman as a deposit and credited them with the full amount thereof, against which credit the Oberman's drew a check of $16,500 to pay a note which they owed the bank. The note was then returned to the Oberman's. A portion of such note indebtedness was paid by the application of collections from certain other instruments of like character endorsed and delivered by the Oberman's to the bank at the same time, but the remainder of the original note was unpaid, due to the refusal of the defendant and other companies to pay the "drafts." Thereupon, the bank caused the Oberman's to give them a written guaranty for the payment of the balance of the indebtedness, and later on took a new note from the Oberman's replacing the same amount of original indebtedness which remained unpaid, and continued to hold the instruments here

in suit as collateral security for the new note. Mr. Easley testified that all of this readjustment was done after the dishonor of the instruments in question by the defendant and notice to the bank that the defendant refused to pay the so-called drafts, and that the net result of the transaction was that the same debt remained due to the bank from the Oberman's and that the bank continued to hold the note of the Oberman's, the collateral feature arising after the dishonor.

On June 14, 1923, after hearing all the evidence the trial Court took the cases under advisement, and on July 9th called counsel before it to make final disposition of the cases. The defendant renewed its motion made before the commencement of the trial for leave to file an amended plea setting up that gasoline was kept in a prohibited manner on the premises at the time of the fire, thereby avoiding the policy. The motion was denied by the Court, who then made a finding for the plaintiff and entered the defendant's motion in arrest of judgment. The Court then held six propositions of law tendered by Appellant as the law of the case, and refused to hold as law two propositions tendered by it, and one of such propositions held that the so-called draft sued on was not a negotiable instrument. Thereupon, the plaintiff's counsel asked leave to amend the title of the suit to read "J. A. Oberman and M. S. Oberman & Bro., who sue for the use of First National Bank of Springfield" and to amend the declaration accordingly. This motion was allowed over the objection of appellant.

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The Court thereupon ordered the pleas of appellant to the original declaration to stand to the amended declaration over the objection of Appellant and entered judgment against Appellant for the sum of $4,845.04 from which judgment an appeal has been perfected to this Court.

It is first contended by Appellant that the so-called drafts, were not negotiable instruments and that the

title to the same did not pass to the bank by assignment.

The instruments in writing contained in red letters across the end this language "This draft will not be paid unless cancelled policy is attached to the draft;" and also thereon was the following: "Payee must sign the receipt, tear it off and attach it to the policy" followed by a receipt to be signed by the policy holder. This instrument was not an absolute promise to pay without condition and therefore, by reason of the provisions of our negotiable instrument act, it was not a negotiable instrument.

Section 18 of Chapter 110 of the Revised Statutes of Illinois provides that "The assignee and equitable and bone fide owner of any chose in action not negotiable, heretofore or hereafter assigned may sue thereon in his own name, and he shall in his pleading on oath * * * * allege that he is the acutal bone fide owner thereof and set forth how and when he acquired title; but in such suit there shall be allowed all just set-offs, discounts and defenses not only against the plaintiff, but also against the assignor or assignors before notice of such assignment shall be given to the defendants." The declaration in this case did not comply with this provision of the statute and it is contended by Appellant that the bank cannot recover in this case by reason of its failure to comply with this provision of the Practice Act. The declaration was undoubtedly defective in that respect. It did not however, fail to state a cause of action but only stated a cause of action defectively. Appellant plead to this declaration and can not now avail itself of this defect in the declaration. This contention moreover cannot be availed of by Appellant for reversal in the present case for the reason that before final judgment the declaration in the case was amended and the Oberman's were substituted as parties plaintiff. While the parties plaintiff in the declaration were stated as J. A. Oberman and M. S. Oberman who sue for the use of the First National Bank

of Springfield, the retention of the name of the bank as usee in the declaration did not prejudice Appellant for the reason that by reason of the fact that by the stipulation of the parties appellant was given the benefit of all evidence which could be introduced as a defense against the claim of the Oberman's and all the evidence in the suits brought by the Oberman's in their own name against the three insurances companies was in fact introduced in evidence in this case.

When the case was called for trial Appellant asked leave to file a special plea with respect to the keeping of gasoline and at the conclusion of the evidence renewed its motion for leave to file such plea and tendered therewith a plea setting forth the avoidance of the policy by reason of the Oberman's having kept gasoline on the premises in glass containers and not in a "tight and enclosed metal can, free from leak" as provided in the Rider on the policy. In Hoerrmann v. Wabash Ry. Co. 141 N. E. 289, it is said: "The allowance of an amendment to a bill after the issue has been formed is a matter largely within the discretion of the court, and new matter changing the character of the bill and making substantially a new case cannot generally be introduced after the cause is set down for hearing. A reviewing court will not reverse for a refusal to allow such an amendment unless a manifest abuse of discretion is shown. Walker v. Struthers, 273 Ill. 387, 112 N. E. 961; Foss v. Peoples Gas Light & Coke Co., 241 Ill. 238, 89 N. E. 351." The court did not err in refusing leave to file the amendments.

It is contended by Appellant that after the substitution of the Oberman's as plaintiff in lieu of the bank, the court erred in ordering the pleas to stand as pleas to the amended declaration, and denying the defendant the right to plead to the amended declaration. When the Oberman's were substituted as plaintiffs, Appellant had a right to plead any defense it had against the Oberman's which it had not already pleaded, if it desired to file additional pleas. Appellant however, did not at

that time ask leave of the court to file any additional pleas setting up additional defenses against the Oberman's but objected to the leave of the court to substitute the Oberman's as plaintiffs. Appellant not having at that time asked leave to file additional pleas, the court properly ordered the pleas to the original declaration to stand as the pleas to the amended declaration.

It is contended by Appellant that the policies of insurance

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became void because of the violation by the assured of conditions subsequent contained therein, to wit: For fraud in the removal and concealment of merchandise covered by the policies; for fraud in the making of padded inventories and over-valuation of merchandise in inventories and in the allged proof of loss; for keeping gasoline on the premises contrary to the provisions of the policy; for oiling the floors and increasing the fire hazard; and for false swearing in the alleged proofs of loss.

While a discharged employe of the Oberman's gave testimony tending to substantiate each one of these contentions, his testimony was contradicated by witnesses called by the plaintiff's. It was therefore a question of fact for the court to determine which witnesses were telling the truth, and the court having seen and heard the witnesses and being in a better position to judge of their credibility than this court, we would not be justified under the evidence in the present case in disturbing his findings, upon these questions of fact.

Appellant had in this case the benefit of all the evidence which it would have had, had the suit been originally instituted by the Oberman's for their own use. We find no reversible error in the record and the judgment of the Circuit Court is therefore affirmed.

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General No. 7665. Agenda No. 71.

October Term, A. D. 1923.

J. A. Oberman, et al, Appellee.

vs.

U. S. Fire Ins. Co., Appellant.

Appeal from Sangamon County.

Ed.- See this abstr. refer to this case, which is our No. 3601

Heard, P. J.

This is an appeal from a judgment for $967.10 damages and costs in a suit upon an insurance policy and is one of the three suits mentioned in the opinion in **Oberman, et al v. Camden Fire Insurance Association,** No. 7664, as having been brought by appellees against three insurance companies to recover the loss sustained by reason of the destruction by fire of their stock of goods in Danville, Illinois.

To which opinion reference is made for a statement of the facts which led to the litigation.

The defendant's pleading consisted of the general issue; and, in addition, thirteen special pleas counting; upon removal and concealment of property; false and fraudulent representations as to the value of the property; false swearing in relation to the loss; concealment of property not destroyed; the commission of acts prohibited by the policy; keeping on the premises gasoline in amount and manner prohibited by the policy; oiling the floors immediately before the fire, etc., whereby the hazard was increased. Before the trial, the defendant moved the Court for leave to amend its special plea in relation to the keeping of gasoline. The plea as originally filed alleged that the assured kept ten gallons of gasoline contrary to the provisions of the policy. The amendment sought to allege that the assured kept two gallons of gasoline in glass containers instead of a "tight and entirely enclosed metal can free from leak," contrary to the provisions of the policy. The Court refused to per-

mit this amendment. At the close of all of the evidence the defendant renewed its motion for leave to amend its special plea and presented to the Court a draft of said amended plea (Abst. 94) but the Court again denied the motion for leave to amend the plea as requested. The action of the

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Court in refusing to allow the filing of this plea is assigned as error. This same question was involved in **Oberman v. Camden Insurance Association, supra,** and we there held that the Court did not err in this respect.

It is claimed by appellant that the proof of loss alleged to have been delivered to the appellant was subscribed and sworn to in skelton form, and the schedules of merchandise and values and damages claimed were inserted by Pettigrew, the adjuster, and did not constitute a proof of loss such as was required by the policy. Appellant filed several special pleas none of which denied the proofs of loss. And appellant cannot complain that the schedules of merchandise and values and damages claimed were inserted by Pettigrew as he was acting as appellant's agent in the adjustment of the loss and estimating the amount of the loss.

Complaint is made that the Court admitted some incompetent testimony. Without passing upon this question suffice it to say that the trial was had before the Court without a jury and there being competent evidence in the record sufficient to sustain his finding it will be presumed that the Court did not consider any incompetent evidence.

Evidence was submitted by appellant which if believed would substantiate each one of its special pleas while appellees submitted evidence in contradiction tending to show that the conditions of the policy were in no respect violated.

Finding no reversible error in the record the judgment of the Circuit Court is affirmed.

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General No. 7666. Agenda No. 40.

October Term, A. D. 1923.

The National Bank of Jerseyville, Appellant,

vs.

Otto Goode and George Rathgeber, Appellees.

Appeal from the County Court of Green County

Heard, P. J.

On August 10th, 1921, one J. W. Johnson executed and delivered to Appellee, Goode, a note for $800.00 due March 1st, 1922, together with a chattel mortgage on property described as:

"One hundred acres of growing corn south of the so called Robley Lane, and east of the Main Drainage Ditch on Fairbanks Valley Farm subject to landlord's lien."

This mortgage was recorded on the 11th day of August 1921.

On February 16th, Johnson, and one Powers, executed a mortgage to Appellant on a lot of personal property among it being "1400 bushels of corn in crib on Fairbanks Valley Farm, Bluffdale township, Green County." This mortgage was given to take up a mortgage which the mortgagors had given on the 18th of August, on practically the same property in which the corn was described as "an undivided one-half interest in 175 acres of growing corn now growing on Fairbanks Valley Farm south of so called Robley Lane and east of the Main Ditch." This mortgage of February 16th, purported to be given to secure one note for $1783.50, of which $900.-00 was due August 1st, 1922, and $883.50 on December 15, 1922. This mortgage contained the usual insecurity clause and provided that the mortgagors retain possession of the property until December 15, 1922.

After its execution Johnson paid $400.00 on the Goode note and mortgage, and upon the first day of

March 1922, the date of maturity, appellee, Rathgeber, went to Johnson's residence to post notice of sale and to foreclose this mortgage. The mortgage required three notices to be posted in the vicinity of the proposed sale, and one of these notices Rathgeber posted on a crib of corn, which he was informed was Johnson's corn and according to Rathgeber's testimony he took possession of the crib of corn for the purpose of selling it under the mortgage. On the 3rd of March, Appellant brought this

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suit in replevin. To the declaration, Appellee pleaded non cepit, non detinet and property in Appellee Goode. The court hearing the case without a jury found the issues for Appellees and rendered judgment against Appellant for costs and ordered a writ of retorno habendo from which judgment Appellant has appealed to this court.

The evidence in the case shows that, August 10, 1921 at the time of the giving of the chattel mortgage by Johnson to Appellee, Johnson had from 240 to 260 acres of growing corn "south of the so called Robley Lane and east of the Main Drainage Ditch on Fairbanks Valley Farm" and it is contended by Appellant that that, Appellant having 240 or 260 acres of growing corn there, and the mortgage only being on 100 acres, without specifying what particular 100 acres, the mortgage is void on the ground of uncertainty. While it is undoubtedly true that a chattel mortgage which does not describe the property sought to be mortgaged with certainty, is void, yet the law regards that as certain, that which can be made certain. While the evidence shows that Johnson had from 240 to 260 acres of growing corn in the locality described in the mortgage at the time of the giving of the mortgage, yet the evidence further shows that this corn was divided into two parts by a ditch and

that one of such parts contained 100 acres so situated as to come within the description in Appellees' mortgage. We are therefore, of the opinion that the mortgage of Johnson to Goode was not void for uncertainty.

The evidence however, without contradiction shows, that all the corn which had been raised on this 100 acres had been husked and sold and that $400.00 of the proceeds of such sale had been paid to Goode and that at the time of the attempted foreclosure of the chattel mortgage by Goode, none of the corn in the crib upon which Rathgeber posted his notices of sale, had been raised upon the 100 acres in question. Goode therefore, had no lien under his chattel mortgage on any of the corn in the crib in question and the court should have found the issues against him on that question. It is claimed however, by Appellee that the evidence fails to show that Rathgeber took actual possession of the corn. While the evidence upon that question is comparatively slight, yet there is some evidence tending to show that he had at least constructive possession of it

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and the case was tried by both parties upon the theory that Rathgeber had taken possession of the corn, as he testified,under the chattel mortgage and that Goode intended at the time of the commencement of this suit to sell the same under the chattel mortgage and as a result of the trial, an order of the court was entered for a return of the property to Appellees which of course, could not be done if they had never had possession of the property.

The judgment of the County Court is reversed and the cause remanded.

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General No. 7672. Agenda No. 43.

October Term, A. D. 1923.

W. J. Edelbrock and Henry E. Edelbrock, Appellee.

vs.

Alva Rexroat, Appellant.

Appeal from Morgan.

Heard, P. J.

Appellees brought suit in assumpsit against Appellant to recover on a promissory note made by Appellant to the Get Gas Service Station, Inc., a corporation, in the circuit court of Morgan County.

It is alleged in the declaration that the Appellant gave his note to the corporation payable to the order of the corporation, in the principal sum of eight hundred and twenty-five dollars, due April twenty-fifth, 1922; and that after the delivery of said note to the said corporation by the Appellant, the corporation, the payee of said note, assigned the note to the appellees for a valuable consideration prior to April twenty-fifth, 1922, when the note was due. The declaration consisted of one count based on the note and the common counts.

The Appellant filed two special pleas to the declaration. The Appellees demurred generally and specially to both pleas and the circuit court sustained the demurrer. The Appellant stood by his pleas and the court gave Appellees judgment for the principal sum of the note and interest. From that judgment an appeal was taken to this court.

While it is undoubtedly the law that upon demurrer pleadings must be taken most strongly against the plaintiff and that only facts well pleaded are admitted by demurrer, yet it is also true that many of the technicalities of ancient pleading have been abandoned and all that is now necessary in a plea to a declaration is a clear and concise statement couched in simple language of suf-

ficient ultimate facts to show a defense or bar to the cause of action set up in the plaintiffs' declaration. (Farmers Bank of Downs v. Ryan, 223 Ill. App. 491.) Powell v. Kempton 7609, 3rd Dist. Ill. App.

The demurrer admitted all the facts set forth in the pleas which were well pleaded and the only question involved upon this

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appeal is, therefore, whether or not contained within these pleas are sufficient statements of ultimate facts to show a defense to the cause of action set up in plaintiffs' declaration.

Section 28 of Chapter 32 Revised Statutes of Illinois provides, among other things "Promissory notes shall not be accepted in payment or part payment of stock issued in persuance of any of the provisions of this act."

Each of the pleas set up that the "sole and only consideration upon which said promissory note filed and made a part of each count was executed for stock issued by the Get Gas Service Station, Inc., a domestic corporation of Illinois" and that "the plaintiff knew all of these facts above pleaded prior to the purchase or the transfer of the note to him, the plaintiff, wherefore by force of the statute in such case made and provided the said note is wholly void."

Since the enactment by the legislature in 1921 of the provision of the law above quoted, it is the fixed public policy in this state in the sale of stock of domestic corporations that such stock shall not be paid for with promissory notes. The note in question according to the facts set up in defendant's pleas was a note given contrary to public policy and was therefore void in the hands of a purchaser who took it with knowledge that it was given in payment of the purchase of stock in such domestic corporation. While this point is not specifically

raised in Appellant's statement, brief and argument filed herein, yet it is sufficiently covered by the statement therein "the pleas set forth that the Appellant had bought stock and given his note for the same and that the Appellees knew that the note that they purchased was given for stock purchased by the Appellant with his note" and "a note given for stock is void in the hands of the corporation or any one purchasing said note from the corporation with knowledge that it was given for stock in violation of the statute."

While the pleas in question attempt to set up another and different defense and do not set up sufficient ultimate facts to constitute such other defense, in our opinion the pleas do state a defense to the note in question and the demurrer should have been overruled.

The judgment of the Circuit Court is therefore revesed and the cause remanded with directions to overrule said demurrer.

General No. 7674 Agenda No. 73

October Term, A. D. 1923.

Anna Dudden, Appellee

vs.

W. D. Knapp, Neal Kommers, Appellants

Appeal from Tazewell.

Heard, P. J.

This is an appeal from a judgment of $800 and costs in an action of trover brought by Appellees against Appellants for the value of a Cole 8 automobile.

In April, 1920, Edward Dudden, son of Appellee, sold his Buick car and retained his license plates therefor bearing number 382,501. In May 1920, Appellee purchased the Cole car in question from a Mrs. Bahner, paying her $800 therefor and receiving from the seller, a bill of sale therefor. On the 8th of July, 1920, Edward Dudden went to the garage of Appellant, where he exchanged the Cole car for an Oakland runabout. On July 11th, Appellee went to Appellant's garage, told Appellant that she owned the Cole 8; that Edward did not have the right to dispose of it; and that she wanted her Cole automobile returned. Appellant refused to return the Cole car claiming that he had sold it to one W. D. Knapp. Later in the same day, Edward Dudden returned the Oakland runabout and placed it in Appellant's garage. Knapp, when sworn as a witness, testified that he had not purchased the Cole car.

Appellant contends that the trial court committed error by permitting persons who had not seen the Cole automobile in question and had no personal knowledge of its condition to testify as to its value. The witnesses in question did not purport to testify from their own personal knowledge, but were called as experts, or persons skilled in the knowledge of the value of second hand automobiles and had heard all the evidence given by Appellee's witnesses as to the kind, quality and condition of the car in question and based their expressions of val-

ue upon the hypothesis that the car was as described by such witness. Such

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evidence was competent. The People v. Lowhone, 296 Ill. 391; Schneider v. Manning, 121 Ill. 376.

It is contended by Appellant that the court improperly admitted in evidence the bill of sale from Mrs. Bahner to Appellee. One of the vital questions in the case was the ownership of the Cole car. Appellee claimed to have purchased it from Mrs. Bahner and the bill of sale was competent evidence tending to prove Appellee's contention.

Appellant testified that at the time of the exchange of the Cole car Edward Dudden displayed to him a certificate from the Secretary of State containing the name of Edward Dudden and the license number which was on the car at the time and sought to testify that he called the police station to verify the name and number on the certificate. The law does not require the keeping of an official record in the police station and the evidence sought to be introduced, could, in no event, have been competent or binding upon Appellee.

At the request of Appellee, the court gave to the jury an instruction as follows: "The Court instructs the jury that while as a matter of law the burden of proof is upon the plaintiff, and it is for her to prove her case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in her favor, although but slightly, it is sufficient for the jury to find the issues in her favor."

In Teter v. Spooner, 305 Ill. 198, it is said: "The use of the adjectives 'slight' and 'clear', with reference to the preponderance of the evidence required to sustain an issue, is only confusing to the jury. They ought not to be used in instructions in any case. * * * * The effect of the adjectives is merely to confuse the jury and invite them to minimize or maximize the weight of the evi-

dence on one side or the other. Such instructions ought not to be given."

An error of this nature however, is not reversible where the verdict could not have been other than it was on the evidence. Stansfield v. Wood, 7647.

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It is complained by Appellant that Appellee's instructions four, six, seven and nine are erroneous in singling out certain issues or items of evidence. In Chaney v. Baker, 304 Ill. 362, it is said: "Instructions ought not to select one item of competent evidence and inform the jury that that item of itself does not establish the case. If it is competent evidence it should be considered by the jury, and if the jury should be instructed as to each item of evidence that of itself would not prove the case, the tendency of such instructions would be to minimize the weight to be given to each particular item of evidence so referred to and so to minimize the weight of all the evidence."

The sixth and seventh instruction did not violate this rule. The fourth and ninth instructions were upon the question of the agency or authority of Edward Dudden to trade or sell the automobile arising out of the relation of parent and child and the son's having possession of the car. While these two instructions would infringe upon the rule, yet their giving did not constitute reversible error for the reason that they were not upon a controverted question in the case as Appellant in his brief says, that it was at no time claimed that Mrs. Dudden was bound by the acts of Edward Dudden as her agent.

Appellee did not within ten days from the time of her purchase of the car from Mrs. Bahner, file in the office of the Secretary of State, an affidavit for certificate of registration as required by law and Appellant tendered to the court instructions bearing upon this question which the court properly refused to give. Appellee by failing to apply for registration within the prescribed time, did not lose her property rights in the car and the

instructions in question had no application upon any question at issue in the case.

Appellant did not claim that Edward Dudden had in fact authority to trade or sell the car or that the relation of principal and agent existed between Appellee and him, but contended that her conduct was such as to estop her from denying Edward Dudden's right to dispose of the car as against an innocent purchaser and offered

instructions upon the question of estoppel which were refused by the court and this is assigned as error.

Appellant bases this contention upon the fact that at the time of the alleged trade, Edward Dudden was in the possession of the car and represented himself to be the owner and that the car bore license plates number 382,501, which had been issued by the Secretary of State to Edward Dudden and that at the time of the alleged trade, Edward Dudden showed to Appellant a certificate from the Secretary of State which contained this number and the name of Edward Dudden. There is a controversy in the evidence as to whether or not an agreement for a trade was actually consummated by the Appellant and Edward Dudden and as to whether or not Dudden represented himself to be the owner of the car. Dudden testifying that he told Appellant that he would take the Oakland car over and show it to his mother and also testifying that he did not represent himself to Appellant as being the owner of the car. He testifies that he did not remember whether at the time and place in question, he showed Appellant the certificate of the Secretary of State showing the license number 382,501. Assuming however, Appellant's evidence to be true, that an agreement for a trade was in fact made and that Edward Dudden did represent himself to be the owner of the car, and that he did show Appellant certificate of registration bearing the number 382,501, such facts do not prove or tend to prove an estoppel as against Mrs. Dudden. If Edward Dudden did show Appellant certi-

ficate from the Secretary of State bearing the number 382,501 which was the registration number of his Buick car, then that certificate was required by law to show, and the presumption is that it did show, that it was for a Buick car and not for a Cole car and it contained a factory number and an engine number which was entirely different from the factory number and engine number on the Cole car which was present at the time. Appellant having notice from this certifidate that it was not for the car for which he was proposing to trade, should have regarded this as a suspicious circumstance and made an examination of the car which would have readily disclosed the engine number and factory number and he could not have been misled by the certifi-

cate in question in making the trade. The evidence shows without contradiction that upon purchasing the car Appellee requested her son to make an application to the Secretary of State for a license for the Cole car as she herself was not able to read or write the English language; that her son was called out of town and remained for some time and the applications was not made; that Edward Dudden drove the car three times, one of which times, Appellee was with him; that Appellee did not know that the Cole car had upon it the license plates in question; that on the 8th of July she was sick in bed and did not know anything about the alleged trade until the 11th of July; that she had given her son no permission to trade or sell the car: that on the day she discovered the Oakland car in her garage, she went to Appellant and demanded her Cole car.

In Sutter v. Peoples Gas Light Company, 284 Ill. 634 with reference to an estoppel **in pais,** it was said: "Such an estoppel is based upon the prevention of a fraudulent result if one were permitted to dispute the existence of a state of facts which he has induced another to believe in and act upon. Before it can be invoked to the

aid of the litigant it must appear that the person against whom it is invoked has by his words or conduct caused the litigant to believe in the existence of a certain state of things and induced him to act upon that belief."

In Washington Home v. City of Chicago, 157 Ill. 414 the court said: "An estoppel by matter **in pais** may be defined as an indisputable admission, arising from the circumstances, that the party claiming the benefit of it has, while acting in good faith, been induced by the voluntary, intelligent action of the party against whom it is alleged to change his position."

There is no evidence in the record that Appellee by her voluntary intelligent action induced Appellant to believe that Edward Dudden was the owner of the Cole car in question and induced Appellee to act upon that belief.

The proper use of an instruction is to apply the rules of law to the facts of the case. C. P. S. Co. v. C. Rys. Co. 309 Ill. 346; People v. Black, 309 Ill. 354. There being nothing in the facts of the case to which the rules of law stated in the instruc-

tions on the subject of estoppel could be applied their refusal was proper. Finding no reversible error in the record the judgment of the Circuit Court is affirmed.

General No. 7679. Agenda No. 76.

October Term, A. D. 1923.

V. E. Meeker, Appellee.

vs.

Harry Gross, Appellant.

Appeal from the County Court of Clark County.

Heard, P. J.

This is an appeal from an order of the County Court adjudging the right of property in one gasoline filling station, the tank, pump and attachments therewith, one air station and compression tank and electric motor and all attachments thereto belonging, to be in Appellee, V. E. Meeker and adjudging costs against Appellant, Harry Gross.

The abstract shows that the parties appeared before the County Court and submitted the case to the Court without a jury upon an agreed statement of facts, which showed that on the 16th day of October, 1922, Appellant leased certain premises to Harry Redman and Doit McMillian for a period of two years beginning on the first day of November, 1922 and ending on the 31st of October, 1924, for the sum of $2400.00 payable on the first day of every month in payments of $100 in advance; that to secure such payments Redman and McMillian executed a promissory note for the sum of $600 and a chattel mortgage upon the property in controversy which they on that day purchased from Appellees; that the rent was paid by the lessees as provided in said lease until July 1, 1923; that in July, 1923, a demand, which in the statement of facts is called, "a demand of five days notice for rent of premises" was given by Appellee to the lessees, the terms of which notice are not shown by the abstract; that a distress warrant was issued by Appellee and the property in controversy was distrained for the payment of the rent for the month of July, 1923; that a judgment in the Circuit Court of Clark County was taken by Appellant against the lessees for the sum of $1649.27 and costs on the tenth of July, 1923, on which

judgment an execution was issued by the clerk of the Circuit Court and by him given to the sheriff of said County; that on the morning of July 10, 1923, Appellee took possession of the property under the terms of the chattel mortgage and that sub

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sequently on the same day the same property was levied upon by the sheriff under the execution issued out of the Circuit Court; that notice of sale was given by Appellee and a sale thereof was made after the levy of the execution by the sheriff; that the sheriff of Clark County under the levy which he made on the property in dispute sold the same on the 26th day of July, 1923; that since the first day of August, 1923, Appellee has been in possession of the premises leased by him to Redman and McMillian.

Appellant in his argument in this court says, "The question involved in this case is whether or not the claimant, V. E. Meeker, being termed the plaintiff in this case, has a right to dispossess the tenants; and after having collected all the rentals which are due after said dispossessment, then and in that case whether or not he can foreclose a purported chattel mortgage which evidently is controlled by a supplemental agreement."

Many authorities are cited upon the question of eviction and much argument is made by both parties upon statements of facts not contained in the agreed statement of facts in the case.

At the time when Appellee took possession of the property in question, the lessees were in default in their payment of rent which the chattel mortgage was given to secure in the sum of $100 and Appellee had a lien thereon by virtue of a chattel mortgage superior to the lien of Appellant's judgment. Appellee had a right to take possession of the property for the purpose of the enforcement of his said lien to the extent at least of

$100 and costs and sell the same under the provisions of the chattel mortgage. Appellant therefore, had no right to dispossess him of said property and the County Court did not err in finding the right of property to be in Appellee.

The judgment is affirmed.

General No. 7681. Agenda No. 49

October Term, A. D. 1923.

G. H. Post, Appellee.

vs.

Harvey C. Miller and Mrs. M. J. Miller, Appellants.

Appeal from Macon.

Heard, P. J.

In the January 23, 1923 term of the Macon County Circuit Court, Appellee procured a judgment by confession against Appellants for the sum of $590.72. Subsequently Appellants appeared in court and moved the court to open up said judgment, stay the execution issued thereon and asked leave to plead the merits of the case. The court granted the motion, stayed temporarily the execution and granted Appellants leave to file pleas to the merits of the case.

Appellants filed a plea of the general issue and two special pleas, to which special pleas a demurrer was sustained. Thereafter, by leave of the court, Appellants filed two additional pleas to which additional pleas, a demurrer was also sustained. Appellants elected to stand by their pleas, withdrawing their plea of the same issue. The court thereupon entered its order that the original judgment in favor of Appellee and against Appellants, entered on January 10, 1923, stand in full force and effect as of the time of its rendition, from which judgment and order an appeal has been perfected to this court. The only question involved upon this appeal, is whether or not, the additional pleas filed by Appellants state any defense to the action.

These pleas allege among other things, that the said note was transferred by indorsement by the Standard Manufacturing Company, the payee therein, to Appellee after the maturity of said note; that one C. B. Swift, acting as agent and salesman for the Standard Manufacting Company took from Appellants a written order for

[illegible]

[illegible]

[illegible]

vs.

[illegible]

[illegible]

[illegible]

[illegible]

a lighting system; that the order provided for the giving of a note for "$515.00, six months at 7% interest to be renewed;" that at the same time there was indorsed on the back of said order "Permission granted to use this light plant 12 months to test its merits before paying for same. It is also understood that C. B. Swift, salesman for the Standard Manufacturing Company, will close enough sales in this vicinity within 12 months to enable the purchaser to pay for this light plant by helping

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sell other light plants, provided said purchaser will fully cooperate and help secure enough good prospects ready to close. On all such sales a credit will be given on this contract at the rate of $45.00 for each sale." Which said indorsement was signed by the said C. B. Swift as salesman for the said Standard Manufacturing Company; that the said Standard Manufacturing Company did by letter ratify the said indorsement made by their said agent; that this said agent of said Standard Manufacturing Company has failed and neglected to close enough sales in the vicinity of Appellants residence to enable Appellants to pay for said lighting plant that they were to receive from sales and that said agent failed to close any sales and did not attempt to close any sales or request Appellants to help secure other prospects of sales at other times, although Appellants have at all times been ready and willing to help sell other lighting plants; that the note in this suit was given at the same time as the giving of the said order for the said lighting plant and the making of the said indorsement thereon that the said note, the said order and the endorsement thereon taken together constitute one contract or agreement; that said note was not renewed by said Standard Manufacturing Company but was assigned to Appellee who proceeded to take judgment thereon.

A demurrer to a plea admits all the ultimate facts alleged in said plea to be true and if such facts consti-

tute a defense, the demurrer should be overruled.

The note in question having been assigned after its maturity, any defense which Appellants might have had against the Standard Manufacturing Company will be available to them as against Appellee.

Where two or more instruments are executed at one time as the evidence of one transaction they will be read and construed together as one instrument inarriving at the intention of the party. (Ill. Match Co. v. Ry. Co. 250 Ill. 400.)

Construing the three instruments in question together while the note provided that judgment thereon might be entered at any time thereafter, it was not the intention of the parties that that phrase should govern over the inconsistent phrase to the effect that the note was to be renewed or over the express agreement that Appellants should have the right to use the lighting plant 12 months to test its merits before paying for the same.

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We are therefore, of the opinion that this suit was prematurely brought and that the facts set up in the pleas constitute a defense.

We are also of the opinion that when these three instruments are construed together that it was the intion of the parties that the Standard Manufacturing Company, the payee of the note through its agents, should close enough sales in the vicinity within 12 months to enable the purchaser to pay for the lighting plant and that it was not the intention of the parties that the note in question should be paid in any other manner. Appellee having contracted with Appellants to close enough sales in the vicinity within 12 months to enable Appellants to pay for the lighting plant and having failed to do so, their breach of this contract was a good and

sufficient defense to the note while it was in the hands of the Standard Manufacturing Company and Appellee having become its purchaser after maturity this defense is likewise good as against him. The judgment of the Circuit Court is reversed and the cause remanded with directions to overrule the demurrer to said pleas.

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General No. 7684. Agenda No. 52.

October Term, A. D. 1923.

John H. Sullivan, As Administrator of the estate of Nina R. Quirk, deceased, Appellee.

vs.

Arcola State Bank of Arcola, Illinois, a corporation, T. E. Lyons, et al, Appellants.

Appeal from Douglas.

Heard, P. J.

Nina R. Quirk died intestate in the city of Arcola on the 30th day of December, 1920. She left surviving her, John S. Quirk, her husband, and two minor sons. At the time of her death she was the owner of two diamond rings and she had on deposit in the Arcola State Bank, in her name, the sum of $275.50. Her account at the bank had shown this same balance for several years past, notwithstanding the fact that in 1920 she had drawn checks in her name on the bank in the sum of $2356.61, which were not charged against her account but were charged against John S. Quirk, her husband, who had embezzled funds of the bank in an amount to exceed $100,000.

Shortly after his wife's death, John S. Quirk took the two diamond rings to the Arcola State Bank and placed them in a vault. In May 1921 the bank failed and shortly thereafter, the officers of the bank took possession of the two diamond rings which were in the vault of the bank and sold one of these rings for $500.00; and this sum of $500.00 together with the $275.50 on deposit in Mrs. Quirk's name, were used by the bank to partially square up the loss occasioned by Quirk's defalcation. The officers of the bank went to the farm of John S. Quirk and took charge of a cow, which the evidence shows belonged to him and sold the same for $35.00, which sum was also credited to Quirk's account.

The second ring was not disposed of by the bank and was in its possession at the time of the hearing of the case. In September 1921, Appellee was appointed administrator of the estate of Nina R. Quirk, deceased and thereafter made demand upon the President of the bank to turn over to him the rings, cow and the bank balance, which demand was refused.

Appellee thereupon caused a citation to be issued out of the County Court of Douglas County under the provisions of sections 81 and 82 of the Administration Act against the State Bank of Arcola,

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T. E. Lyons as President of the bank and T. E. Lyons, individually. alleging that the Arcola State Bank had in its possession, goods, chattels, money and other effects belonging to the estate of Nina R. Quirk, deceased.

A hearing was had in the County Court and an order entered therein and an appeal taken to the Circuit Court where after hearing, the court entered an order finding that the bank was entitled to retain and keep said sum of $275.50 and ordering that the Arcola State Bank pay Appellee the sum of $500.00 obtained by the bank from the sale of the diamond ring; that the bank deliver to Appellee said other diamond ring and that it pay the costs of the proceeding, from which order an appeal has been perfected to this Court.

It is the contention of Appellants as to the two diamond rings, that they did not come into the hands of the bank until after the death of Nina R. Quirk and that therefore, they could not be reached by a proceeding had under Sections 81 and 82 of the Administration Act.

We cannot agree with the contention of Appellant that the statute refers only to property which came to the hands of the persons charged before the death of the deceased person. To place such a construction up-

on it, would render it almost nugatory as in every case a person having possession of property and effects of a deceased person, who is threatened with a citation, would only have to turn them over to a third person in order to defeat the proceeding.

In Blair v. Sennott 134 Ill. 78 in construing these sections in question it was said: "In our opinion this does not mean merely goods, chattels, moneys, etc., placed in the hands of the party charged by the deceased in his lifetime, but we think it includes also goods, chattels, moneys, etc., which belong to the estate of the deceased, and which have come into the hands of the party charged since the death of the deceased. The language contemplates present ownership, and since a dead man can own nothing, 'belonging to any deceased person' can only mean 'belonging to the estate of any deceased person.' "

We are of the opinion that the Court did not err in ordering the return of the one diamond ring and the proceeds of the conversion of the other.

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Cross error is assigned by Appellee that the Court did not order the payment of the bank balance, $275.50. Deceased while having on deposit in the bank only $275.50 had drawn, during the last year preceeding her death, sums aggregating many times the amount of such deposit and it was not error for the court to refuse to order the bank to pay the amount of such deposit to the administrator. There is no evidence in the record that the cow ever belonged to the deceased.

The judgment of the Circuit Court will be affirmed.

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General No. 7688 Agenda No. 55

October Term, A. D. 1923.

Fredericka Lohnes, Administratrix of the estate of Henry Lohnes, deceased, Appellee

vs.

St. Louis, Springfield and Peoria Railroad, Appellant

Appeal from Tazewell.

Heard, P. J.

March 8th, 1920, Henry Lohnes, deceased, while driving a one horse wagon loaded with coal on Kerfoot Street in East Peoria at the intersection of said street with the Interurban Line of Appellant, was struck and killed by an electric interurban car owned and operated by Appellant and this suit was brought by Appellee under the statute to recover for damages thereby caused to the widow and nearest of kin of said deceased.

There were three counts in the declaration. The first count, charges general negligence. The first additional count is very similar to the original count except that it avers that the defendant permitted weeds, shrubbery, brush and young trees to grow on the south side of its right of way from Kerfoot Station westward and that thereby the view of the defendant's tracks and defendant's cars moving westward was obstructed and charges as negligence their permitting of the weeds, shrubbery, brush and young trees to grow on the south side of its tracks; also charges general negligence in operating the electric car and that it ran at a high and negligent rate of speed. The second additional count is identical with the first additional count except that it charges in addition thereto general negligence in operating the car, excessive speed and that no warning was given of the approach of the train. Each of said counts avers the exercise of due care on the part of deceased.

There was a trial before a jury. At the close of plaintiff's testimony the Appellant tendered an instruction to instruct the jury to find the issues for the defen-

dant; which instruction the trial judge refused to give. This instruction was again submitted at the

end of all the testimony, and was again refused by the trial judge.

The following special interrogatory was submitted to the jury: "Was Henry Lohnes, while approaching and going upon the track of the defendant, in the exercise of due care and caution for his own safety?" The jury answered the special interrogatory in the affirmative and found a general verdict for the Appellee in the sum of thirty-three hundred dollars thereon this appeal was prayed for and allowed.

It is contended by Appellant that the Court erred in refusing at the close of Appellee's testimony to instruct the jury to find the issues for the defendant and that the evidence entirely fails to show that at and just prior to the time of the accident, deceased was in the exercise of due care for his own safety. A railroad crossing is a well known place of danger. A person who sues to recover for the death of a person killed in attempting to cross the same, must show affirmatively that the person killed, at and just prior to the time of the accident, was in the exercise of due care for his own safety. He cannot rely upon the instinct of self-preservation but must show that the deceased did some act, from which the jury might infer that he was exercising some care for his own safety. If some one act from which such inference might be drawn, be shown by the evidence, then it is a question of fact for the jury to say whether or not the deceased did exercise ordinary care for his own safety.

In the present cast, at the close of Appellee's case the evidence did not show affirmatively any one act, which tended to prove that at and just prior to the accident, deceased exercised ordinary care for his own safety, but on the contrary, the only two eye witnesses whose evidence was introduced by Appellee, testified

that deceased drove right ahead on to the crossing in front of the train and testified to a state of facts, from which the inference would be that deceased was guilty of contributory negligence, rather than he was in the exercise of ordinary care for his own safety.

Appellant however, did not elect to stand by his motion to instruct the jury at the close of Appellee's evidence but introduced evidence in its own behalf and introduced the testimony of witnesses who testified that as deceased approached the track at the

time and place in question, he stopped his horse and then whipped it up. Thereby the error in refusing the instruction at the close of Appellees evidence was waived. Ferrero v. K. of S. 309 Ill. 476. Under this state of facts, it was a question of fact for the jury to determine and they having answered the special interrogatory that deceased was in the exercise of due care and caution for his own safety while approaching and going upon the track of Appellant, we would not be justified in setting aside that finding, unless we found from an examination of all the facts and circumstances in evidence in the case, that the verdict of the jury was so manifestly against the weight of the evidence as to indicate that it was the result of prejudice or a misconception of the nature of the case. Upon this question, we do not deem it necessary to pass at the present time.

It is strongly contended by Appellant that the Court erred in admitting evidence of a so called plat of the location where the accident occurred made by the witness Zimmerman. This so called plat, is not drawn to scale and attempts to locate the brush and willows on the south side of Appellant's track. There is no claim or pretense that it correctly protrays the situation. While the accident occurred March 8th when there was no foliage, brush or willows, they are on this plat portrayed as a black impenetrable mass. It is claimed however,

by Appellee that this specific objection was not made in the trial court and the only objection there being that it was incompetent, irrelevant and immaterial, this point cannot be raised here. Appellee's contention is not tenable. The plat was not correct but was misleading and therefore it was incompetent.

For the purposes of laying a foundation for the introduction of some photographs of the location of the accident taken on March 13th, 1920, Appellee introduced evidence tending to show that the conditions there were the same on the 13th of March as they were at the time of the accident. In rebuttal Appellee called witnesses who testified that certain brush and willows were cut down by employees of Appellant and removed between the 8th of March and the 13th of March. Thereupon Appellant called a witness Boshel and offered to prove by him that he was the section foreman who had charge of all work of that kind in that locality during the entire year 1920; that none of the brush and willows were removed from the place in question from

the time of the accident until the 5th of April and that they were removed at that time. But the testimony of the witness to that effect and his time book were excluded by the trial court upon the theory that it was not proper surrebuttal.

The author of Jones on Evidence, Volume 3, Section 809, says:

"Rebutting evidence means not merely evidence which contradicts those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. The trial judge is to determine what is evidence in rebuttal, and it lies within his discretion to receive or exclude such testimony. The practice should not be encouraged of allowing either party, after resting his case, to amend and add to his proof, unless by repeated experiments he con-

forms to the view of the Court."

Underhill on Evidence. Section 374, p. 551, lays down the following doctrine:

"What evidence shall be received in rebuttal is, as we have seen, largely discretionary with the Court. If the evidence which is offered is such that a party should have properly introduced it in making out his original cause of action or his defense, it is not error for the Court to reject it if he seeks to introduce it under the guise of rebutting evidence."

It is the settled rule of practice in this state that when a plaintiff holding the affirmative of the issue has given all the evidence he proposes to offer in support of the issue ,the defendant shall then introduce all proof in contradiction of the proof adduced by the plaintiff and establishing matters of defense and the plaintiff may then rebut affirmative evidence introduced by the defendant. If new and affirmative matter is introduced in the rebuttal, then defendant may meet and overcome it, but that is the extent of defendant's right in surrebuttal, and what evidence may be introduced in the surrebuttal is generally a matter in the discretion of the court.

In the present case, Appellee shows that the conditions on March 13th, when the photographs in question were taken, were not the same as at the time of the accident, introduced new and

affirmative testimony to the effect that the greater portion of the weeds and brush near the location in question, had been cut. This was new and affirmative matter. If it was untrue, as Appellant attempted to prove by the witness Boshel and the time book, then Appellant in his defense in chief had no reason to anticipate it and at that stage of the case testimony on Appellant's part that the weeds and willows were cut on the 9th of April, 1920, would have been incompetent, irrelevant and immaterial.

While the admission of evidence in surrebuttal in generally in the discretion of the court, yet that discretion is not an arbitrary one and where new and affirmative testimony is introduced by the plaintiff in rebuttal, the defendant has a right specifically to contradict such new and affirmative testimony and in this case Appellee having introduced evidence that the brush and willows at the place in question were cut down between the 8th and the 13th of March, 1920, Appellant had a right to specifically contradict such testimony and to show that such weeds or that such brush and willows were in fact cut down on the 9th of April, 1920.

The questions as to whether or not Appellant was liable in damages for the death of deceased, was an exceedingly close one under the evidence in this case. It was therefore, necessary that the rulings of the court in the matters of admission of evidence and the giving of instructions should be strictly accurate.

In Newell v. Cleveland, C. C. & St. L. Ry. Co., 261 Ill. 511, it is said: "Where a railroad train and a person traveling on the highway each approaches a railroad crossing at the same time, it is not the duty of the company to stop its train, but it is the duty of the traveler, in obedience to the known custom of the country ,to stop and not attempt to pass in front of the advancing train."

In Toledo, W. & W. Ry. Co. v. Jones, 76 Ill. 316, it is said: "It is further complained that Appellant's first instruction was modified to their injury. As asked, it was as follows: 'The court instructs the jury that it was not the duty of the engineer in charge of the locomotive on nearing the road crossing, to stop his train for the purpose of avoiding a collision with the wagon and team he saw approaching the crossing, though by applying the brakes he could do so in time to avoid the collision; but it was the duty

of the person in charge of the team, in obedience to the known custom of the country, to stop his team and not attempt to pass in front of the advancing train.' This instruction states the law, and is in conformity with the rulings of this court in St. Louis, A. & T. H. R. Co. v. Manly, 58 Ill. 300 and Chicago & A. R. Co, v. Jacobs, 63 Ill 178."

In the present case, Appellant to present this phase of the law to the jury, requested the Court to give an instruction which is identical in language with the instruction requested in the instruction above quoted, with the substitution of the words "motorman" for "engineer"; "electric car" for "locomotive"; "car" for "train;" "horse" for "team"; "Henry Lohnes" for "the person in charge of the team." This instruction the Court modified, so as to render it entirely unintelligible. The instruction as requested, stated the law and should have been given to the jury without modifications.

For the errors above indicated, the judgment of the Circuit Court is reversed and the cause remanded.

General No. 7623. Agenda No. 6.

October Term, A. D. 1923.

Lizzie Farrow, Defendant in Error.

vs.

The Eldred Drainage and Levee District, Plaintiff in Error.

Error to Greene.

Niehaus, J.

In this case the defendant in error, Lizzie Farrow, brought suit in the circuit court of Greene county, against the plaintiff in error, The Eldred Drainage and Levee District, to recover damages alleged to have been sustained by her, to crops growing on her land during the years 1916, 1917, 1918 and 1919, by the overflow of waters from a ditch constructed by the plaintiff in error, as part of the drainage and levee work of the district, and to carry out the purpose for which the district was organized. The declaration avers, that the plaintiff in error, which had been legally organized as a drainage and levee district, dug and opened the ditch and constructed a levee north and south immediately west of the land of the defendant in error; that in constructing the ditch and levee, plaintiff in error, negligently caused the dirt taken from the ditch to be thrown on the west side of the ditch, and thus formed a levee; and thereby left the land of the defendant in error, unprotected from the over flowing waters of the ditch; also, that the plaintiff in error wrongfully diverted the natural water course of Hurricane and Bushnell Creeks, so as to cause them to flow through the ditch referred to; and that it negligently failed to dig the ditch of sufficient size and capacity to carry off the waters from these creeks and the surface water draining into the same; also, that the defendant negligently allowed the ditch to fill up, and

omitted to dredge it out, so as to keep it in condition to carry off the water from the creeks mentioned, and the surface water draining into the same; that in consequence of these acts of negligence on the part of the plaintiff in error, the waters in the ditch overflowed on to plaintiff's land

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during the years mentioned, and caused damage to her crops. There was a trial by jury; and a verdict and judgment for $575.00 in favor of the defendant in error. A Writ of Error is prosecuted to reverse the judgment.

It is insisted by the plaintiff in error, that the proof does not show, that the defendant in error was the owner of the crops that were damaged, but tended to show, that the crops were owned by her husband. The defendant in error owned the land upon which the crops were raised, and her husband looked after and managed the work of putting in the crops, and the harvesting, and disposing of them in the same manner as if they were his own, with the consent and acquiesence of his wife. It may be said concerning this contention that the part which the husband takes in the cultivation and management of his wife's land, with her knowledge, acquiesence and consent, natural to the marriage state, does not deprive the wife of her right of property in the crops. Where a husband and wife live together on the wife's farm, and he contributes personal labor and manages the farm in such a way as is consistent with the common interests of both, and the proper enjoyment of the property, it does not convert the products of the farm into property of the husband. Ludd v. Barnes 79 Ill. 437; Primmer v. Clabaugh 78 Ill. 94; Alsdurf v. Williams 196 Ill. 244.

It is also urged by the plaintiff in error as a ground for the reversal of the judgment, that the work of the

drainage district was lawful, and authorized by the statute, and was permanent in its character; that under these circumstances if injury results to the land owner, it must be regarded as injury to the market value of the land; and that where there is injury to the market value, the measure of damages which applies, is the difference between the fair cash market value of the land before the construction of the work of the district, and its market value after the injury has resulted. We are of opinion, that questions arising from a permanent and lawful construction resulting in injury, are not involved in this case. The declaration avers in reference to the negligence upon which the

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right for recovery is based that the plaintiff in error diverted the waters of two natural water courses into a ditch, which it constructed in connection with its drainage levee work, along the land of the defendant in error, and that it failto dig the ditch deep enough, or wide enough, to carry the waters of the creeks, to prevent overflow on the land of defendant in error; also that it did not properly maintain this ditch, by negligently failing to dredge it, and thereby prevent its filling up. The jury were warranted in reaching the conclusion from the evidence that these averments of negligence were sustained by the evidence; and the evidence justified the conclusion that the defendant in erorr was the owner of the crops which were damaged. We find no reversible error in the admission or exclusion of evidence on the trial; nor in the giving of, or the refusal to give, instructions. The judgment is therefore affirmed.

Affirmed.

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General No. 7626. Agenda No. 9.

October Term, A. D. 1923.

The People of The State of Illinois, Defendant in Error;

vs.

A. Maton, Plaintiff in Error.

Error to County Court Christian County.

Niehaus, J.

In this case an Information containing two counts was filed by the States Attorney of Christian county against the plaintiff in error Arthur Maton, alleging violations of the Prohibition Act. The first count in the Information alleges that the plaintiff in error "did unlawfully have intoxicating liquor in his possession;" and in the second count it is alleged that he "did unlawfully have in his possession intoxicating liquor intended for the use in violating the provisions of the Prohibition Act of the State of Illinois." A motion by the Defendant to quash the Information and each count thereof was denied; a motion for bill of particulars was also denied. Afterwards the Defendant pleaded not guilty and a trial of the case resulted in a verdict by the jury finding plaintiff in error guilty as charged in the first and second counts of the Information. The motion by plaintiff in error for a new trial was denied; also a motion in arrest of the judgment; and the court thereupon sentenced plaintiff in error to be punished by imprisonment in the county jail for sixty days, and assessed a fine of $150.00 under each count. Also that the jail sentence imposed under each count run concurrently, and that the plaintiff in error be committed until the fines and costs were paid. This writ of error is prosecuted to reverse the judgment.

Error is assigned on the ruling of the court denying the motion to quash the Information. The first count of the Information which charges merely the possession

of intoxicating liquors by the plaintiff in error, is clearly insufficient as a charge of an offense against the Prohibition Act. Under the Prohibition Act, the mere

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possession of liquors is not necessarily unlawful, but it is the possession of liquors by a person not legally permitted under the Act to possess liquor; and it is in that case that the possession of liquors shall be considered prima facie evidence, that such liquors are kept for the purpose of being sold bartered exchanged given away furnished or otherwise disposed of in violation of the provisions of the Act. The Act expressly provides, that 'it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied by a person as his dwelling only, provided such liquors were lawfully acquired and are for use only for the personal consumption of the owner thereof, and his family, residing in such dwelling, and of his bona fide guests when entertained by him therein.' Section 40 Prohibition Act Chapter 43 Cahill Revised Statutes; People v. Peisz 226 Ill. App. 363; Street v. Lincoln Safe Deposit Co. 254 U. S. 88; Hilt v. U. S. 279 Federal 422; 10 A. L. R. 1548. The use of the word unlawfully in connection with the allegation of possession does not have the effect of making the count legally sufficient, inasmuch as the use of this word represents merely the conclusion of the pleader, and does not state any fact from which the inference of unlawfulness would arise. It does not mean anything more than to say that the possession was contrary to the form of the statute. "Where the statute creates an offense, indictments should contain proper and sufficient averments to show a violation of the law." Cannady v. People 17 Ill. 158. The charge in the second count which alleges, that the plaintiff in error unlawfully had in his possession intoxicating liquors intended for the use in violating the provisions of the Prohibition

Act is also insufficient because it does not specify what provision of the Prohibition Act was violated thereby, that is to say, whether the plaintiff in error intended to sell, barter, transport, or furnish such liquor for beverage purposes. The object of the Act is to make the use of the liquor for beverage purposes illegal, and a punishable offense. An averment, that the plaintiff in error intended to use the liquor to violate the provisions of the Prohibition

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Act, some of which make the use of liquor, when used for non-beverage purposes, as for instance, when used for medicinal or sacramental purposes, lawful, involves merely the conclusion of the pleader, drawn from a fact or facts which are not stated, but which the pleader regards as a violation of the Act. It is elementary, that facts which are essential elements to constitute an offense should be stated. This count is therefore also legally insufficient to constitute a charge of violation of the Prohibition Act. For the reasons stated, the motion to quash the Information should have been sustained; and the judgment and sentence is therefore reversed, and the cause remanded, with directions to sustain the motion to quash the Information.

Reversed and remanded with directions.

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General No. 7627. Agenda No. 10.

October Term, A. D. 1923.

The People of the State of Illinois, Defendant in Error.

vs.

Paul Tokoly, Plaintiff in Error.

Writ of Error to County Court Christian County.

Niehaus, J.

In this case the plaintiff in error Paul Tokoly was convicted for violation of the Prohibition Act, charged in the second count of an indictment, (containing two counts) upon a trial had in the county court of Christian county. The indictment having been certified by the order of the circuit court to the county court. The plaintiff in error was acquitted of the charge contained in the first count. The count upon which the conviction is based charges, that the plaintiff in error, "did unlawfully have intoxicating liquor in his possession contrary to the form of the statute, etc."

The plaintiff in error prior to his arraignment and trial, made a motion to quash the indictment, which was denied; and after the trial, and the verdict of guilty, he made a motion for a new trial, and in arrest of judgment; both motions were denied. He was thereupon sentenced to imprisonement in the county jail for sixty days, and to pay a fine of $200.00, and costs of suit; and to stand committed in the county jail until the fine and costs were paid. A writ of error is prosecuted to review the judgment.

The principal ground urged for reversal of the judgment is that the count upon which the plaintiff in error was convicted is legally insufficient as a charge for the violation of the Prohibition Act; and that it does not charge the commission of an offense. The questions raised concerning this count upon which the conviction is based are exactly the same as those considered and decided in the case of People etc. v. Arthur Maton, (General No. 7626) in which an opinion has been filed at the present term; and for the reasons set forth in the opinion in that case, the judgment is reversed.

Reversed.

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General No. 7631. Agenda No. 12.

October Term, A. D. 1923.

Jane A. Craig and S. K. Hughes, Trustees,
Defendants in Error.

vs.

232 Ill. 647

John W. Grein, Jr., Christine C. Grein, Carl A. Hurst, B. L. Kirk, Trustee, George J. Hurst, John Grein, Daniel Morrissey, John C. Somers, Will A. Coolley, D. C. Dobbins and A. O. Plowman,
Plaintiffs in Error.

Writ of Error to Champaign.

Niehaus, J.

In this case a writ of error is prosecuted by John W. Grein, Jr., Christian C. Grein, Carl A. Hurst, B. L. Kirk, Trustee, George A. Hurst, John Grein, Daniel Morrissey, John C. Somers, Will A. Coolley, D. C. Dobbins and A. O. Plowman, Plaintiffs in Error, to reverse a decree of the circuit court of Champaign county rendered in a foreclosure proceeding, based upon a trust deed securing an indebtedness of ~~$2684.17~~ #26084.17. No question is raised about the correctness of the finding concerning the amount of the indebtedness; but as a ground for reversal of the decree, it is urged that under the provisions of the trust deed, the complainants in the foreclosure proceeding had no right to the allowance of a solicitor's fee in the sum of $800.00; nor to the allowance of $87.75 paid for insurance on the premises included in the trust deed; nor the $5.00 allowed for bringing the abstract of title down to date; nor the $10.00 paid by the complainants for the bond of the receiver appointed in the case. Concerning the allowance of the foregoing items, the trust deed contains the following provisions, in reference to what may be allowed as a part of the mortgage debts, and paid out of the proceeds of a foreclosure sale

of the premises: "The costs of such suit, all costs of advertising, sale and conveyance, including the reasonable attorney's fees and commissions * * * * and a reasonable attorney and solicitor's fee, and also all other expenses of this trust, including all monies advanced for insurance, taxes and other liens or assessments, with interest thereon at seven percent per annum." The fact that $800.00 is a reasonable and the usual and customary fee for the necessary services of the solicitors in a foreclosure proceeding of this kind is not contested: but it is contended

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that the evidence shows, that the complainants in the proceeding made a contract with their solicitors, by which the solicitors were to receive but $350.-00 for their services; and therefore that the allowance for solicitor's fees should not have exceeded that amount. We are unable to draw this conclusion from the evidence; while the evidence does show, that the complainant Jane A. Craig paid her solicitors the sum of $350.00, it also appears, that this was a retainer fee, and that she was to pay them no more on that account; but that the understanding as to solicitor's fees was clearly to the effect, that they should receive the reasonable fee for their services, which the trust deed provided for. Concerning the item for insurance premium, we think it sufficiently appears from the evidence, that it was necessary to expend this amount of money to keep the premises insured for the protection of the lien of the trust deed, as required by the provisions of the trust deed, and was therefore properly allowed. The other two items were allowed as coming within the provisions of the trust deed relating to all other expenses of the trust. The first item for $5.00 was expended by the complainants in bringing the abstract of title down to date. While there might be some doubt about the legal

propriety of the allowance, if it were for the cost of making an abstract of title of the premises in question, a somewhat different question is presented by the allowance of this item. Here the abstract had already been made; and this expenditure was merely to bring it down to the date of the foreclosure proceedings, and decree, for the information of the purchaser or purchasers at the foreclosure sale. It can hardly be doubted, that the expenditure to complete the abstract for the purpose indicated, might have a very beneficial effect in encouraging bidding for the property by persons who perhaps would not bid without being satisfied as to the condition of the title of the mortgaged property as affected by the foreclosure proceeding. The expenditure was trifling in amount, and should be regarded as coming fairly and reasonably within the clause of the trust deed referred to regarding the expenses of the trust. The other item of $10.00, which was paid by the complainants,

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as a premium for the bond of the receiver in the case, is obviously an expense directly incurred in the prosecution of the suit. For the reasons stated, the exceptions to the allowance of the items referred to, were properly overruled. The decree is affirmed.

Affirmed.

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General No. 7630 Agenda No. 11

October Term, A. D. 1923.

The People of the State of Illinois, Defendant in Error

vs.

Chester McDaniel, Plaintiff in Error

Error to the Circuit Court of Edgar County.

Shurtleff, J.

Plaintiff in error on November 17, 1922, was indicted by the Grand Jury of Edgar County for selling intoxicating liquors and in the month of February, 1923, he was tried and found guilty upon two counts of the indictment. Judgment of conviction was entered and the court sentenced plaintiff in error to pay a fine of two hundred dollars upon the first count, and to pay a fine of two hundred dollars and be committed to the county jail for a period of sixty days upon the second count. It was further the order of the court that the defendant stand committed until the fine and costs were paid.

On June 6, 1923, after plaintiff in error had been in jail under this commitment for over sixty days and in fact had served 112 days, he filed a petition in the Circuit Court of Edgar County, praying a release under Chapter 38, Section 766, page 689 of Smith's Revised Statutes of Illinois. In said petition plaintiff in error set forth the facts as recited, and further presented that he had absolutely no money or property out of which the said fine of four hundred dollars and costs could be paid; that all of the property of the petitioner, which he had, consisted of an automobile of the value of twenty-five dollars and the clothes he wore.

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There was a hearing upon the petition and from the testimony adduced by plaintiff in error, it appears, without contradiction, that about two or three years prior to his conviction, plaintiff in error's father had given him one thousand dollars and that it had been loaned out, the notes made payable to plaintiff in error. Sometimes the business of loaning this money had been attended to

by the father and sometimes by the son. The money had been paid in two or three months prior to the conviction and at the time of plaintiff in error's conviction, the money was on deposit in plaintiff in error's name in the Citizens National Bank. After Plaintiff in error was committed to the county jail, he gave his father a check for this one thousand dollars, except about five dollars which he says he deducted out, with which to pay some bills and plaintiff in error testifies that these funds are now in his father's hands and that he, plaintiff in error, is only to have the interest on this money, and is to have no part of the principal. It is sufficient to say that these moneys were in the bank deposited in plaintiff in error's name, at the time of said conviction, and that the notes or securities into which said moneys have been transferred are now in plaintiff in error's name and that no other person is making any claim to said funds or to any part of the same. Furthermore, plaintiff in error made a deduction out of the principal of these funds, and used a part of them to pay his bills, which is inconsistent with the arrangement testified to by plaintiff in error. Plaintiff in error must be charged with having funds in addition to the automobile and clothes, at the time this petition was filed, to the amount of $995.

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Section 766, Chapter 38, Revised Statutes, **supra,** provides:

"Whenever it shall be made satisfactorily to appear to the court, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs or costs only, it shall be the duty of the said court to discharge such person from further imprisonment for such fine and costs, " etc.

In this case it was not made to appear, satisfactorily or otherwise, that the petitioner had no estate, out of which said fine and costs could be paid, but it was

conclusively shown that the petitioner did have estate and funds ample and sufficient to pay the said fine and costs and the court committed no error in overruling the petitioner's petition.

A motion is made in this case by the defendant in error to dismiss the writ of error and the record submitted showing that on June 3, 1923, after the entry of the orders in this cause, a check executed by John McDaniel was given to the clerk of the Edgar County Circuit Court for four hundred thirty-six dollars and fifteen cents, with the following endorsement (on front of check): "Paid by John McDaniel under protest for Chester McDaniel, fine and costs in full in People vs. Chester McDaniel," and (on back of check): "This check is executed by John McDaniel to pay the fine and costs in full in the case of People vs. Chester McDaniel. No right of appeal or to sue out a writ of error are waived by execution of this check." This check was cashed by the clerk and disposed of by him as all fines, fees and forfeitures are by said official disposed of. Just what authority third parties may acquire in and to rights to appeal and writs of error, by endorsements and reservations upon checks, cashed by the clerk, is not made plain and we shall not extend this

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opinion to discuss. The motion may present sufficient ground to dismiss the writ of error. However, the ground, in the record, for affirming the judgment of the lower court, are so ample and cogent, and so specifically accentuated by the matters brought to us by the motion to dismiss, that the judgment of the lower court will be affirmed.

Judgment affirmed.

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General No. 7633 Agenda No. 14

October Term, A. D. 1923.

Delia Roe, Appellee

vs.

Sarah E. Roe, William R. Roe, Appellants

Appeal from the Circuit Court of Edgar County.

Shurtleff, J.

This is a suit brought by Delia Roe, appellee, wife of Fred Roe, against the appellants, Sarah E. Roe and William R. Roe, parents of Fred Roe, for damages to the plaintiff as a result of the alleged alienation of the affections of Fred Roe by the appellants.

The declaration consists of four counts. The first two counts charging merely an assault; third and fourth counts charging that the defendants by acts of misconduct and by persuasion alienated the affections of Fred Roe from the plaintiff. The facts of the case are as follows:

About a year and a half prior to the marriage of the appellee and Fred Roe, which occurred on the first of November, 1919, the two families through the acquaintances of Fred and Delia Roe became acquainted and the children of the appellee's family, who lived near Arcola, Illinois, and the children of the appellants family, who lived near Chrisman, Illinois, visited backward and forward and visits were exchanged by the appellants and the

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parents of the appellee, and in the summer of 1919, prior to the marriage, the two families, including the appellee and her prospective husband, Fred Roe, took a motor trip through the East, visiting Niagara Falls and other points of interest.

There seems to have never been any friction between these two families prior to the marriage. Shortly before the marriage on two or three occasions, the question of the marriage of Delia and Fred Roe was discussed by

the parents, Mr. and Mrs. Roe and Mr. and Mrs. Seiben. The question of religion was discussed, the Seiben family being Catholics and the Roe family being Protestants, and so far as the Roe family was concerned, there was never any objection on that ground to the marriage, and no opposition voiced by the parents of Fred Roe for any other reason.

There were present at the wedding the brother and sister of Fred Roe, and brother and sister of Delia Roe, appellee. Immediately after the marriage, the bride and the groom went to Chicago and returned Sunday night following, arriving at the home of appellants in Chrisman early Monday morning, the marriage having occured on Saturday before.

Monday following the return of the young people from Chicago, they went to the old Roe homestead, which was to be their home, with the sister and brother of Delia Roe, who had come over to Chrisman, and the brother and sister and mother of Fred Roe and the day was spent, together with a part of the next day, in washing windows and wood work and arranging the house for the new married couple. It was made a social affair as well as assistance to the young people and everybody was happy and aiding in starting the bride and groom on their marriage journey.

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Previous to the marriage, the appellants had purchased of Horace Link and Company of Paris, Illinois, about one thousand dollars worth of furniture, paying therefor, after the discount for cash, nine hundred fifty dollars. They placed their furniture in the house above mentioned and had left a considerable number of household articles and ninety chickens at the farm for them to use, the appellants having moved from this place to Chrisman and turning their homestead over to the young married couple for their home. William R. Roe, appellant, owned all of the horses, farm implements and stock on the farm except three horses he had given his son, and Fred, his

son, was to use the same and farm the land for one-third of the crop, William Roe retaining part of the house, this arrangement having been entered into prior to the marriage. A few days after the marriage and going to house keeping as aforesaid, the appellant, Sarah Roe, and daughter, Mrs. Nettie Manning, went with the appellee to Danville, Illinois, about thirty miles distant and purchased some articles and gave to the appellee.

About the first of December, 1919, and about a month after the mariage, Mrs. Seiben, mother of the appellee, and her daughter were over to Chrisman visiting the appeelle and her husband, Fred Roe. On Sunday afternoon they drove to Chrisman to the home of the appellants. There was a quarrel or dispute arose at that time over Mrs. Seiben, mother of the appellee, objecting to her son-in-law, Fred Roe, assisting Everett Roe and other members of the Roe family in work on their own land, and she complained quite a bit about the appellants having asked Fred Roe to assist in some work.

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From the evidence submitted, it appears that from this time on the differences between these families increased and were accentuated by criminations testified to by appellee's witnesses and by recriminations testified to by the appellants. The appellants frequently visited the farm where appellee resided with her husband, and there is evidence that Sarah Roe, at various times, called the appellee a "black Catholic" and also the appellants testified that appellee called Sarah Roe an "old black Methodist," and other epithets were indulged in by each toward the other, according to the testimony, but each party denied making the statements so charged to her.

In June, 1920, while the appellants were at the farm, and Fred Roe, with others, was cultivating corn, an altercation took place between appellant Sarah Roe and the appellee, at which time, there is testimony tending to show, Sarah Roe assaulted the appellee, and upon Fred Roe starting to interfere in behalf of his wife, the tes-

timony tends to show that the appellant, William Roe, restrained him or told his son not to interfere, but let them fight it out. Growing out of this on the 19th day of June, the appellants gave a bond in the sum of five thousand dollars, in favor of Fred Roe and appellee, said bond reciting that said Sarah Roe had broken into the dwelling home, on said farm, without the consent and against the will of said Fred Roe, and that the said Sarah Roe had struck and threatened to beat beyond recognition the said appellee, and to otherwise hurt and injure her and that the said appellant, William Roe, had stood by and witnessed the acts of his said wife and had aided and abetted her in the same, and had also threatened to hurt,

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harm and injure both the said Fred Roe and appellee. The condition of the bond was that the said appellants should not commit a breach of the peace and that the appellant, Sarah Roe, should not go into the said house or upon the said farm, and that the appellant, William Roe, should not go upon said farm, except in the direct and peaceable way of looking after the said farm, while the said Fred Roe and appellee were occupying the same as tenants. After this Sarah Roe did not go to the farm. There is testimony that appellee soon after the marriage, insisted upon appellants giving her husband, Fred Roe, a deed to the farm. There is further testimony by a number of the women in the neighborhood that appellee had stated to them, about threshing time, that "if her husband did not move to town, she would leave him;" "that she would not live upon a farm;" and appellee testifies to statements made by appellants and especially by the father, that "she (appellee) would have to leave the farm; Fred was going to stay," and that "she (appellee) could go to hell."

During all of these controversies, of which there were many, the husband, Fred Roe, took the part of his wife, appellee, and so far as the evidence shows was loyal

to her and became estranged from his parents.

In the fall of 1920 appellee and her husband commenced to sell off their furniture and deposit the money in the bank, some deposits being made in their joint names and some of the moneys being deposited in the name of appellee. On the 27th day of December, 1920, appellant, William R. Roe, served a notice upon his son, Fred Roe, to vacate and abandon the farm upon March 1, 1921, and in the latter part of February, 1921, appellee and

her husband had a sale to dispose of their property, preparatory to moving off from the farm. At Christmas in 1920 Fred Roe purchased for appellee a wrist watch costing twenty-one dollars. Up to the first of March, 1921, the relationship between appellee and her husband had always been agreeable and affectionate.

Appellee, prior to the time that she left her home in Chrisman, drew out of the bank at Ridgefarm, Illinois, the balance of the money derived from the sale of their goods, which had been deposited in their joint name, and deposited it at another bank in Ridgefarm to her own personal account and then drew a draft and transferred the money to a Mattoon bank, which was near her home, Arcola, Illinois.

Appellee left her home in Chrisman the first of March, 1921, taking her belongings. A few days before leaving, her father and sister came over from Arcola and went out to the home of Fred and Delia Roe. During the last days that Delia Roe and Fred Roe lived together in Chrisman, her father and sister were at their home.

There was a meeting held at the Central Hotel in Paris, Illinois, at which meeting a lawyer by the name of Figenbaum, of Mattoon, Illinois, was present at the solicitation of Mr. Seiben, father of Delia Roe. On that occasion a conference was held, lasting practically all afternoon.

During the last days of their living together they

went to Mattoon and Decatur, Illinois, to secure a place to work and live, and on the day that appellee left Chrisman, Mr. Seiben, her father, took her to the train in Chrisman, and her husband, Fred, went along and after they were on the train, Fred kissed

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his wife and told her he would be over to Arcola the following Wednesday, this occurring on Monday, and he went over on that day.

Appellee and Fred Roe, up to the time and including the night before she went to Arcola, occupied the same bed and lived and cohabited as husband and wife, and so far as any outward appearance was concerned, there was no break in their affections. From this time on appellee and her husband do not appear to have lived and cohabited together as husband and wife, though after the first trial of this case in the spring of 1922, Fred Roe visited his wife at her father's home in Arcola. Neither does the evidence indicate that Fred Roe has had any communication or relationship with his parents, appellants, since the separation in 1921. There are many other facts and circumstances of testimony, produced in the record, but we have only covered a general outline of the case.

There was a trial by jury and a verdict and judgment in favor of appellee for forty-five hundred dollars, and appellants have brought the record to this court for review.

Appellants contend that contradictory instructions were given in this case, which should reverse the judgment. The Court instructed the jury, in behalf of appellee, that if they found from a preponderance of the evidence that the affections of Fred Roe for plaintiff were destroyed and that the acts and conduct of the defendants together, or either of them alone, was the controlling cause which destroyed such affections, and without such conduct such affections would not have been alienated, then plaintiff would be entitled to recover, etc.

Another instruction was given for appellee, embodying the same principle, but inform-

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ing the jury that the conduct of the defendants need not be the sole cause, provided that such conduct was the controlling cause. Appellants insist that these instructions ignore the relationship between appellants and Fred Roe, and ignore the question of good faith on the part of appellants and constituted error. The Court below gave an instruction for appellants, fully covering the relation of parent and child and informed the jury, that the appellants had a lawful right to advise, if they did so honestly and in good faith and that on the question of alienation of the plaintiff's husband's affections, the rule of law with respect to the rights of parents is different to the rule of law with respect to the right's of strangers that, "Parents have a legal right to advise their children with respect to their domestic matters, if they do so in good faith and for the purpose of aiding and advising their children in ways that are proper and consistent with the children's welfare."

In **Huling v. Huling,** 32 Ill. App. 519, similar instructions were given, and the Court held that the instructions as a whole were inconsistent and contradictory and reversed the case, but the instructions in Huling v. Huling went further and were drawn with less care than the instructions in the case at bar. Each instruction in this case properly stated the law,—appellee's instructions as applied to a stranger and appellants as to a parent or parents. Appellee's instructions, standing alone, entirely ignore one of the defenses of appellants, the right of a parent to advise and direct a child, when done in good faith, as fully discussed in **Huling v. Huling, supra,** and as fully set

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out in instructions for appellants. Does this constitute contradictory instructions? It has been held that the jury are presumed, in arriving at their verdict,

to have considered the instructions as a whole and to have noticed the qualifications which one instruction makes upon another. **R. I. & P. Ry. Co. v. Leisy Brewing Co.,** 174 Ill. 547; **Toledo Wabash & Western Ry. v. Ingraham,** 77 Ill. 309; **Cunningham v. Stein** 109 Ill. 375; **Lawrence v. Goodwin, Jr.,** 170 Ill. 390; **Lawrence v. Hagerman,** 56 Ill. 68; **Moore v. Aurora, Elgin & Chi. Ry. Co.** 246 Ill. 60.

In **Lawrence v. Hagerman,** the Court held: "That the instructions given for the plaintiff and defendant must be construed together, and when so considered, if they state the law correctly as a whole, the error that may appear in one series will be deemed corrected by the other," and this has been the uniform rule laid down by the courts. The instructions in this case are not contradictory or misleading. Appellee's instructions merely state the general rule, in an alienation suit, as applied to all cases or to cases generally, and does not undertake to explain or define what may be a "controlling cause." Appellant's instructions define and explain "the controlling cause," to the extent of informing the jury that certain conduct or advice of parents, given in good faith and for a worthy motive, cannot be construed as conduct tending to the alienation of affections, as construed by the law or constitute "the controlling cause" of the loss of affections. The instructions of one supplement and explain the instructions of the other, and all taken together fairly stated the law to the jury in this case.

The appellants further urge error in this case, on the ground

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that the Court instructed the jury that they might find punitive damages in this case, without any evidence having been offered as to the pecuniary ability of the appellants, or either of them, to pay. We have gone through all the cases cited by appellants upon this point, and must overrule the objection. There was evidence and considerable testimony of a general nature as to

farms and property, owned by the appellants, or one of them. This, however, was not necessary to warrant the court in instructing that punitive damages may be assessed in a proper case. It is not so much in such cases what the guilty parties can pay, but rather the amount which they ought to pay, as asserted by the courts in various cases. Counsel for appellants cite **T. W. & W. Ry. Co. v. Smith,** 57 Ill. 517, in which case the court instructed the jury that they had the right to take into consideration the finincial situation of the defendant, when no evidence had been offered as to defendant's finances, and it was held error; and counsel cite **Peters v. Lake,** 66 Ill. 206, which does not appear to sustain appellants contention. It is not error to instruct, in a proper case, that the jury may find punitive or exemplary damages whether there is any evidence of defendant's financial ability, before the jury or not. **T. W. & W. Ry. Co. v. Smith, supra; Peters v. Lake, supra; Smith v. Wunderlich,** 70 Ill. 426; 17 Corpus Juris, 295, 296; **Holmes v. Holmes** 64 Ill. 294. The last case seems to settle the rule beyond question and the assignment of error is overruled.

Appellants urge a reversal in this case, on the ground that the verdict is against the manifest weight of the evidence and should be set aside. We have carefully read the record and given con-

sideration to this assignment of error. It seems impossible that these families, after the year of friendly relationship, ending in the marriage of their children, should so soon after that event, absorb such bitter hatreds towards each other, and some of the testimony in this case would not appeal to ordinary reason, except as results followed, apparently confirmatory of its truth. The record of all these differences is too long and it would serve no useful purpose to discuss it in detail in this opinion. Appellants testified to statements and transactions on the part of appellee, which, if true, would place the blame for the family difference

largely upon appellee, and this testimony, in some respects, is very strongly corroborated, and a court in this case, would enter with more enthusiasm into a weighing of the evidence, as to the conduct of these parties, except for the bond to keep the peace, entered into by appellants,, running to appellee and her husband. This instrument is the full proof of conduct by appellants, prior to that time, which would warrant a son taking such a proceeding against his father and mother. All of this testimony was submitted to the jury, together with all the facts and circumstances in evidence and appellee did submit evidence as to the conduct of the appellants, which, if they believed by the jury, would warrant a verdict on that part of the case in appellee's favor.

It is seriously contended by appellants that the affections of Fred Roe were never alienated from appellee, and that there is no evidence in this case showing or tending to show, that Fred Roe, the husband, ever ceased in his affections to his wife, or that he ever left her. It is true that in every controversy and difference that came up between appellee and appellants from

the time of the marriage in 1919, to the abandonment of the farm in March, 1921, Fred Roe always and on every occasion took the part of his wife, defended her and broke relationship with his parents over such matters to the extent that in June, 1920, Fred Roe brought or was about to bring a criminal action against his parents to have them bound over to keep the peace. On Christmas, 1920, Fred Roe gave his wife a nice new wrist watch, and, so far as the testimony shows, at all times until March, 1921, appellee and her husband lived happily, peaceably and affectionately together as husband and wife. The father, it is true, had notified them to vacate the farm, and this they were planning to do upon March 1st, in the meantime making sale of their household goods and stock. Nothing about this notice to vacate the farm, served in December, 1920,

shook or even interfered with Fred Roe's affection for his wife after that event. There is testimony in the record that appellee and her husband about March 1, 1921, visited Decatur and Mattoon, with a view to finding a place to work and a place to live, but nothing was found. Appellee relates a circumstance on or about the day of leaving the farm when appellant, William Roe, was on the farm that her husband, Fred Roe, procured a gun and was going to kill himself. She relates another circumstance occurring at about the same time, when her husband was driving her in a car to Chrisman, that Fred Roe started to drive the car off an eight foot embankment, but appellee caught the wheel. At about this time Fred Roe told his father-in-law, Selben, that he had no place to take his wife, appellee, except to send her to her father's home. They stayed at a friend's in Chrisman, early in March, before appellee went to her father's home. They slept

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together that night as husband and wife. Fred Roe kissed his wife goodbye on the train the next morning when she was leaving for Arcola. Fred Roe was at Arcola two or three days later, staying over night, sleeping with his father-in-law. A few days before this appellee, her father and husband and one or two others were at a hotel in Mattoon, consulting with a lawyer about the bringing of this suit. Appellee had on or before February 28th employed an attorney to make the charge of alienation of affections against appellants. Up to this time and thereafter appellee was living, sleeping and cohabiting with her husband, Fred Roe. At this time she says his affections were alienated very much but she gives no particulars. After Fred Roe left her father's home in the early part of March, 1921, appellee did not see her husband until about a month after the first trial of the case in the spring of 1922 when Fred Roe stayed all night at her father's home. Appellee testifies that she has received no support from her husband since

the separation in March, 1921.

There was much contradictory evidence, but if the jury believed from all the evidence, facts and circumstances in the case, that on or about March 1, 1921, Fred Roe told his father-in-law, Sieben, that he had no other place to which he could take the appellee and was instrumental in having her return to her father's home, and that since that time said Fred Roe had not supported or provided forhis wife, and had not lived with her, there was certainly before the jury some evidence that Fred Roe's affections for his wife had been alienated, and it could not be held as a matter of law that the verdict in this respect was manifestly against the weight of the evidence.

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The jury saw the witnesses and heard the evidence and the trial court has heard the arguments on a motion for a new trial, and has entered the judgment and, in the state of the record in this case, there appearing no error that would warrant a reversal of the judgment, the judgment of the Circuit Court of Edgar County is therefore affirmed.

Affirmed.

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General No. 7636 Agenda No. 17

October Term, A. D. 1923.

National Loan Company, Appellant

vs.

Oscar M. Jones, W. F. Costigan, Sr., J. J. Rolofson, Appellees

Appeal from McLean County Court.

Shurtleff, J.

This was an action in replevin and trover, first tried in Justice Court and by appeal in the County Court of McLean County. A jury was waived and there was a finding and judgment for appellees, from which this appeal is prosecuted.

Appellant's title to the personal property is founded upon a chattel mortgage acknowledged by Albert R. King, the owner of the property, upon October 27, 1921, and recorded in the Recorder's office of McLean County on the same day. King, the mortgagor, was a resident of White Oak Township, in said county, at the time of giving the mortgage, but he acknowledged the same before a justice of the peace in another township. King, the owner, gave another chattel mortgage upon personal property, on the same farm, to one Costigan, Sr., upon March 18, 1922, and a similar mortgage to one William P. Raber, on October 11, 1922. There was a judgment entered against King, in the County Court of McLean County, upon November 4, 1922, in favor of Oscar M. Jones.

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On December 4, 1922, a sale was had on the King farm of the personal property of King, and the appellee, J. J. Rolofson, an auctioneer, had charge of the sale. Rolofson testified that King, the owner, made the arrangements with him, to conduct the sale; that he knew of some mortgages and liens upon the property, but knew nothing of appellant's mortgage; that the full

handling of the property and disposition of the proceeds was in his hands and that he paid out all of said proceeds, deducting his own expenses and charges and had paid the balance of said proceeds upon the claims of Costigan, Raber and Jones; that he paid moneys to them because they had mortgages and liens upon the property. Rolofson states that he paid no moneys to King, the owner, who was doubtless insolvent. Rolofson, at the sale, sold the property, guaranteed by him to the purchasers to be free from liens. So far as this record shows, it was Rolofson's personal guarantee. On January 31, 1923, appellant, through an agent, made a demand in writing upon Jones, Costigan and Rolofson, for a return of the property described in appellant's mortgage, but the testimony shows that none of the appellees had any of such property at the date of such demand and that none of appellees, except Rolofson, ever had had anything to do with the possession of any personal property upon the King premises. It was stipulated that Rolofson paid O. M. Jones $235 proceeds of said sale, to apply upon the Jones judgment, and the Costigan, Sr., mortgage was paid by Rolofson. There is evidence by King that Costigan, Sr., closed in on him and "served notice on the property," but Costigan, Sr., testified that he had nothing to do with the sale and in the view we take of the case this would make no difference. There is in this record an absolute failure to establish and identify any

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of the property described in appellant's mortgage, as sold at this sale, or the amount or value of any such property sold. King testifies that the property was all sold except some horses which died, but he does not remember what any of the property "brought." Appellant produced the witness Ensign, cashier of the Hudson State Bank. Ensign clerked the sale and testifies that Rolofson turned over all the proceeds of sale to him. Ensign had the sales sheets and

testified from them. The total proceeds of sale were $1261.75. The sheets showed the sale of a manure spreader for eight dollars and a mowing machine was sold for $3.50. There was a horse sold, of similar description to the horse described in appellant's mortgage, named "Bill," but no testimony was offered to show the sale price. There were some cows sold and the amounts of sale testified to, but while there is described in appellant's mortgage "a maure spreader" and a "mowing machine," and a horse named "Bill" and three Jersey milch cows, we have searched the abstract of record in vain to find any evidence identifying any of the property sold as property in appellant's mortgage. We have also gone through the record, fully, and find that Ensign, the clerk, identified no porperty sold. He had all the sale sheets, but they were only used to refresh his memory and none of them were offered in evidence. King, the owner, was on the stand, supposedly capable of identifying all of his property, but he identifies none of the items described in the chattel mortgage, as sold by Rolofson. He simply states all of the property mortgaged was sold except the three horses which died. King merely states that the property was sold on the 14th day of December. King states it

was sold at "that" sale, but no sale is described by King. He states no facts as to the sale, by whom held or how made, or anything to indicate that it was the same sale described by Ensign and Rolofson. King testifies that there was a lot of stuff sold that was not in the mortgage. King says he was forced to have the sale and he knows nothing about what anything was sold for. In this state of the record, a court might infer that Rolofson sold the property described in appellant's mortgage but there is no testimony to establish that fact. The evidence that certain articles of property were sold, bearing a description similar to a like article in the mortgage, does not

establish that appellees sold or converted any of appellant's property and the fact that all of King's property was sold that day and "at a sale," does not establish even **prima facie,** that appellees or either of them sold or converted any of appellant's mortgaged articles. We can not understand this condition of the record when the clerk of the sale, with the sale sheets, was before the Court and also the owner, capable, we assume, of identifying each article sold by Rolofson, and of stating whether it was the article set out in appellant's mortgage. Still, none of the sale sheets was introduced in evidence and no article sold was properly identified. Even if such identification had been fully made, the evidence is insufficient to hold appellee Jones or Costigan, Sr., for trover. Jones took no part in the proceeding, except to receive two hundred thirty-five dollars paid by the Hudson Bank to him, and the only evidence against Costigan, Sr., is that he closed in on King, "came out and served a notice on the property." This he had a right to do and there is no

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evidence that Costigan, Sr., took and further steps in the matter ,except to accept his money from the Hudson Bank. This testimony does not show Jones or Costigan, Sr., chargeable with trover. Rolofson was employed by King, the owner, to sell the property and King gave Rolofson the list of the property, from which to prepare the sale bills. Rolofson, at King's request, employed Ensign of the Hudson Bank to clerk the sale and all proceeds of sale were turned over to the Hudson Bank. Rolofson was merely an agent or employe of King, the owner, in making this sale and distributing the proceeds, as King directed and only received a fair compensation for services performed. There is no evidence tending to show that Jones, Costigan, Sr., or Rolofson, knew anything about appellant's mortgage, and there is no testimony showing, or tending to show, that any person, other than King, the owner, set in mo-

tion and carried out the sale of this property. King was acting through his attorney, English. Under such circumstances, whatever cause of action appellant might have against any of the appellees, for property identified in its mortgage, the proceeds of which had passed into any of the appellee's hands, it would not be in trover against these appellees.

The question is raised in this case as to the validity of appellant's mortgage, executed by the mortgagor, while living in one township of McLean County, and acknowledged by the mortgagor before a justice of the peace of another township in the same county. Appellees set out the various acts that have been passed by the Legislature, in regard to the acknowledgment and entry of chattel mortgages, and insist that the amendment of 1915, as follows: "Such instruments shall be acknowledged

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before a justice of the peace or the county judge where the mortgagor resides or before the clerk or any deputy clerk of the municipal court of the City of Chicago," is a return to the former law, when such mortgages were required to be acknowyedged before a justice of peace in the same township in which the mortgagor resides.

In Watkins v. Dunbar Gen. No. 7650 at this term, this Court has passed you the identical question and held the mortgage not legally acknowledged. The judgment of the County Court is affirmed.

Affirmed.

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General No. 7642. Agenda No. 23.

October Term, A. D. 1923.

H. M. Griswold and H. E. Clayton, Appellants

vs.

Peter Sattler and Freda Sattler, Appellees.

Appeal from County Court of Sangamon County.

Shurtleff, J.

Appellants brought suit in replevin against the defendants to recover the possession of certain household goods, sold by appellants on the installment plan, to appellees. The first transaction was upon July 13, 1920, when appellees purchased certain articles of the value of $301.50 and executed and delivered one note for the amount of $301.50, drawing interest at the rate of seven per cent per annum, and payable at the rate of twenty-five dollars per month. There was an additional note taken by appellants for the sum of five dollars, due five years after date, and drawing interest at seven per cent per annum.

On September 9, 1920, appellees purchased a book case from appellants for the sum of $22.50, which was held by appellees under a lease from appellants, and on October 1, 1920, there was an additional purchase of stove board to the amount of $8.50, making a total indebtedness of $332.50. Although payments had been made by appellees and the appellants testify that when the later purchases were made, "they were to go into the same arrangement

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(chattel mortgage) and that all payments made were to apply pro rata on the debts. At a later time appellees purchased two library tables for the sum of fifty dollars from appellants and a lease was taken of the tables. These leases provided that the lessee "may purchase the goods at any time during the lease for the total, "with 7% interest from date, unless all payments are made when due." At the time of giving the chattel mortgage, appellees paid sixty dollars

down and continued payments, so that on October 24, 1922, appellants had received from the appellees, in payments, the sum of $337.50. It is conceded by appellees that these payments should cover the items of $22.50 and $8.50 purchases, and it is conceded by all parties that the two library tables were not paid for and that appellants took the same under the writ of replevin and are entitled to said tables.

After appellees had made payments to the amount of $337.50 on said goods and the chattel mortgage debt, the library tables, not being paid for and the appellants claiming a balance of interest to the amount of $14.87, on the chattel mortgage debt, brought suit in replevin, in Justice Court, and took all the property described in the chattel mortgage and the library tables. There was a trial in Justice Court and an appeal to the County Court of Sangamon County, whereupon the cause was submitted to a jury, and there was a verdict and judgment in favor of the defendants and that the right of possession of all the property, except the two tables, was in the defendants. The testimony showed that appellants had taken and then had the two tables under their writ of replevin, and that the appellees made no claim to the same.

The case is brought to this Court by appeal, for review.

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Appellants complain that the Court below did not permit them to show the consideration of the note for five dollars. We have carefully examined the record and no such offer was made by appellants. Appellants while on the witness stand, were cross examined fully as to the purpose and consideration for this note and one testified that he did not know and the other said the note was a mistake. The question was fairly put to the jury, whether the purpose of this note was to charge interest in addition to seven per cent and to contract for interest at a greater rate than seven per cent, and if the jury so found, they were instructed that appellants

could not recover any interest on the chattel mortgage note. Appellants complain because the instruction did not contain the words, "per annum," but we do not believe that the jury were misled by this instruction.

Appellants complain as to the giving of appellees' first instruction as follows: "The court instructs the jury that when a person owes several accounts to the same person, the person owing the accounts when making a payment has the right to direct upon which of the several accounts the payment shall be applied." This instruction fairly stated the law, and even though appellees may have agreed in making their purchases, to apply all payments pro rata, yet when it came to making the actual payments, appellees had the right to have their payments applied as they, appellants, directed. It was shown by appellees and not contradicted, that when they purchased the library tables they stated to appellants that they did not desire to make any further purchases until they had paid up the chattel mortgage.

When payments were made by appellees to appellants, at certain times, the balance of the indebtedness had been marked, by the

bookkeeper, on the back of the receipts, and before the last three payments were made, in sums of ten dollars twice and the final payment of $3.50, appellees had been advised by the bookkeeper as to the amount of the balance of the debt, and had paid it, according to the bookkeeper's figures, in full.

Appellants complain as to the form of the verdict and judgment, making no finding as to the library tables, in appellants' behalf, but appellants are in possession of the tables and appellees can obtain no order for the return of the chairs, and we do not deem this such an error, under the circumstances of this case, as would warrant a reversal of the judgment.

Some complaint is made by appellants as to some

of the other instructions given for appellees. We have examined the instructions fully, and while one of them may be faulty, we are satisfied from an examination of the entire record that substantial justice has been done in this case, and that the judgment should not be reversed.

Judgment affirmed.

General No. 7648 Agenda No. 29

October Term, A. D. 1923.

A. D. Arnold, Appellee

vs.

Lewis N. Willson, Appellant

Appeal from the Circuit Court of Morgan County.

Shurtleff, J.

This suit was brought by appellee in justice court to recover the value of two horses which appellee claimed were killed by reason of the negligence of the appellant in operating his automobile on the hard road between Jacksonville and Springfield. From the justice court the case was taken on appeal to the Circuit Court of Morgan County. Appellant's defense to the case was in brief, that appellee's servant, one Merwin Ator, turned twenty-six horses out of appellee's field at the north side of the road, upon the hard road without warning, as the appellant was driving his car toward Jacksonville, and was passing by a gap in appellee's fence, protected only by a piece of woven wire, which appellee's servant negligently let down, permitting the drove of horses, which were being pursued by a dog, to rush headlong out upon the hard road against appellant's car. Some of the horses passed in front of the car, some of them to the rear, but four of them ran headlong into the north side of appellant's automobile, wrecking the car.

The road at the place of the collision runs almost, if not

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exactly, due east and west. From the scene of the collision eastward the road gradually slopes downward for several feet and there is a curve in the road about one-half mile east of that point. From the scene of the collision, westward, the road runs straight east and west without a grade of any consequence and without a curve for a mile or more. The appellee farmed lands on both

sides of the road. He lived about one-half mile south of the hard road. There was a cinder driveway leading from the hard road southward to his residence. There was a patent gate giving access to the cinder driveway from the hard road. Directly opposite and north of this gate across the hard road was a gap in the woven wire fence which ran along the north side of the road. This gap opened into a cornstalk field where there had been a field of corn which had been gathered in the fall and early winter of 1922. At the time of the collision and for some time prior thereto, the appellee was permiting about twenty-six head of horses to run loose and feed in this stalkfield. A piece of woven wire fence of the same kind from which the fence was constructed was used to stretch across the gap in order to keep the horses from leaving the field, which consisted of forty acres or more. There was nothing about the gap to attract the attention of anyone traveling toward it in a car until almost opposite it. On the south side of the road there was a pasture extending from the hard road southward one-half mile to the residence of the appellee.

At the time of the collision the appellant was driving westward on the north side of the road. There was a sharp conflict in the evidence regarding the rate of speed at which he was driving. He testified that he was driving about twenty or

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twenty-five miles per hour and witnesses for the appellee asserted that he was going about thirty-five to forty miles per hour. There was also much conflict in the testimony as to whether a number of horses had already crossed the road before the actual collision. The appellant and his witnesses contended that no horses were in the road as he approached and that his car was run upon by four of the herd of horses that came out of the field and that the horses in a herd, pursued by a barking dog, Merwin D. Ator, appellee's servant, on horseback being at a considerable distance back of them,

ran out upon the highway suddenly without notice to the appellant, colliding with the north side of his car. Ator, son-in-law and employee of appellee, testified that a number of horses had already crossed the road and others were following in a walk when the appellant crashed straight into the herd and against the last of the horses that came upon the highway. Several minutes before the collision, Ator, on horseback, had crossed the road and opened the gap. In his testimony he stated that when he crossed the road he saw the car of the appellant approaching about one-half mile from the east; that he opened the gap and let the horses out.

The horses collided with the car just opposite the gap in the fence along the north side of the road. Four of the horses came into contact with the car, one jumped upon and across the engine, and one hit the front fender.

Appellee's servant, Ator, further testified that at the time he rode into said highway, the horses were congregated around the gate at the north side of the road and waiting to be permitted to cross; that he looked up and down the road in either direction to

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ascertain if any automobiles or other vehicles were near at hand and if it would be safe to drive said horses across the highway. At this time there was no automobile in sight upon said hard road in either direction from said gateway except the autombile driven by appellee, which at that time was over a half mile to the eastward from this gate. Ator, seeing that no car was in close proximity to said gate, took down the wire that was across the gateway and, as soon as he did this, the horses proceeded out from the corn field and into and across said road. The horses at this time were not excited and were not running or galloping but were proceeding across the highway in an orderly manner and were in plain view of any person approaching said gateway and upon said highway from either direction, and could be seen by anyone coming

from the eastward for at least three-quarters of a mile. As the horses stated through the gate Ator rode on through the gate and into the corn field to get behind the horses, and states that he saw the car of the appellant approaching but that the horses were at this time crossing the highway and that there was a string of horses entirely across the highway at this time, some of them being in the gateway on the south side of the road and the car of the appellant at this time being several hundred yards distant from the gateway. Appellant was driving a Willys-Knight coupe weighing about thirty-seven hundred pounds, and was traveling between thirty-five and forty-five miles per hour and did not slow up or attempt in any manner to stop his car as the horses were crossing the road but drove the car directly into the herd of horses, striking a group of horses which were in the rear of said herd on the north side of said hard road and in line with the gateway on the north side of the road.

There were two distant theories of fact in this case, appellee contending that appellant, driving at an excessive rate of speed, drove his car directly into the rear animals of the herd, while they were crossing and nearly across the road and in plain sight of appellant, while the appellant's theory of the case was, that while driving his car at a moderate and lawful rate of speed along this road, the first of the horses in this herd to cross the road burst out from the gap and crashed into his car, and appellee and appellant each supported his respective theory as to how this accident happened by abundant corroborative testimony.

Where the evidence is close and conflicting, the instructions should be accurate, applicable to the evidence and not misleading. **Kranz v. Thieben,** 15 Ill. App. 482; **P. D. & E. Railway Co. v. Wagner,** 18 Ill. App. 598.

Appellee's instruction number one informed the jury that if they believed from the evidence that the injuries complained of "were caused by the negligence or care-

lessness of the defendant, without any such fault or negligence on the part of the plaintiff's servant, etc., then the jury should find for the plaintiff." The appellee cannot recover if his servant was guilty of contributory negligence regardless of whether his negligence was such fault or negligence as that of the appellant. The appellee cannot recover if his servant was guilty of contributory negligence regardless of the extent and degree of his negligence. **City of Lanark, v. Dougherty,** 153 Ill. 161; **Penn Coal Co. v. Kelly,** 156 Ill. 9.

Appellant criticises appellee's third instruction, which informed the jury that if the jury also believes from a preponderance

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of the evidence that the plaintiff has sustained injury to his property by reason of the negligent conduct of the defendant, leaving it to the jury to determine what conduct of the appellant would be "negligent conduct" for which the appellee could recover. The case was first tried in justice court and there were no pleadings. The instruction, or other instructions, should have advised the jury as to the issues in the case and the duty of appellant in the use of the road. To some extent this was covered by other instructions. The instruction as given was error. **Baker & Reddick v. Summers,** 201 Ill. 52. In said third instruction and others in behalf of appellee, the jury were instructed that it was the duty of appellee to exercise ordinary care at "the time of the alleged acts in question." This was not clear and was misleading. The instruction does not indicate that it was the duty of the servant of the appellee to exercise ordinary care immediately prior to and at the time of the collision. On this point in this case, the jury should have been accurately instructed.

Appellee's fourth instruction contains the same vice as last mentioned in appellee's third instruction. Appellee's sixth instruction informed the jury that, "if the rate of speed of a motor vehicle operated upon any pub-

lic highway in this state exceeds thirty miles an hour such rate of speed shall be **prima facie** evidence that such person operating such motor vehicle is running at a rate of speed greater than is reasonable having regard to the traffic and the use of the way, or so as to injure the life or limb or injure the property of any person."

Appellee offered testimony tending to show that appellant was

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running his car at a speed greater than forty miles per hour. This was denied and proof submitted by appellant that his car was not running at a greater rate of speed than twenty-five miles per hour. The giving of this instruction in this form, although not a mandatory instruction, has been held error.

In **Johnson v. Pendergast,** 308 Ill. at page 261, the Court said: "Where two facts are so related to each other that in reason and human experience the existence of one may fairly be inferred from the other, the law may declare that proof of one shall be **prima facie** evidence of the existence of the other. Such a rule is one which the policy of the law and the ends of justice require, and in every case it is sufficient to authorize the finding of the fact presumed to exist unless contradicted or explained. It may either be a rule of law or a rule created by statute, as in the case of the possesion of implements, devices or apparatus for gambling, the possession of stolen property soon after the larceny, or the failure, suspension or involuntary liquidation of a banker within thirty days from receiving a deposit. **(Meadowcroft v. People,** 163 Ill. 56.) That a certain fact is made by law or statute **prima facie** evidence of the existence of another does not change the burden of proof but merely determines the verdict or finding if no other evidence is introduced. The existence of the **prima facie** case is provisional, and does not change the burden of proof but only the burden of introducing further evidence. It means only that a determination of a fact

shall be sufficient to justify a finding of a related fact in the absence of any evidence to the contrary. The only effect is to create the necessity of evidence to meet the **prima facie** case created, and which, if no

proof to the contrary is offered, will prevail. (**Helbig v. Citizens' Ins. Co.** 234 Ill. 251; **City of Carlinville v. Anderson,** 303 id. 247; 2 Chamberlayne on Evidence, sec. 994; **Inhabitants of Cohasset v. Moore,** 204 Mass. 173; **Kelly v. Morris,** 6 Pet. 622.) As soon as opposing evidence is received the case is to be determined upon all the evidence,—the **prima facie** evidence and all other evidence,—and the question is whether the weight preponderates in favor of the party having the burden of proof. The streets and highways are for the use of the public generally, and each person using the same has rights and assumes duties and obligations to others, and the plaintiff assumed the burden of proving that he was in the exercise of the care required by the law and that defendant was negligent in failing to observe such care. This was to be determined by the jury from all the evidence in the case."

And the Court say further, page 264: "It is doubtful whether the ordinary juror would understand the legal meaning of the term **prima facie,** but at any rate," etc.

In this case, under the reasons of the rule laid down in **Johnson v. Pendergast, supra,** we regard the giving of appellee's sixth instruction as reversible error. There was no occasion in this case for the operation of the rule as to a **prima facie** case, as every claim was contested. Even though appellant was driving his car at an excessive and unlawful rate of speed, upon appellant's theory of the case, while appellant was opposite the gap or north gate, the horses of appellee dashed out upon appellant's car and struck it, appellant could not have been guilty of negligence in violating the statute as to speed, for the reason that appellant's rate of speed in no manner would

have contributed to the injury.

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The same accident would have happened if appellant's car had been traveling at any other or slower rate of speed. The instruction, in the form stated, should not have been given and may have tended to confuse the jury.

There are some further criticisms made upon appellee's instructions, but as the case will be submitted to another jury, doubtless any other errors appearing in appellee's instructions will be corrected.

The judgment and verdict in the lower court is reversed and the cause remanded for another trial.

Reversed and Remanded.

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General No. 7654 Agenda No. 35

October Term, A. D. 1923.

Helen McDaniels, Appellee

vs.

S. J. Huntley, Appellant

Appeal from the Circuit Court of Sangamon County.

Shurtleff, J.

This case grows out of an automobile accident which occurred on the public highway when the car of Charles Wilson, in which appellee was riding, collided with that of the appellant on the 1st day of August, 1922, about five miles northwest of Springfield. Appellant, who is a farmer and resides in the vicinity where the accident occurred, was driving his Ford car out of a lane going east. The Ford car of Charles Wilson, in which appellee was riding with a bathing party, composed of the appellee, Dora Bryant, May Rose Bryant, Harry Adams and Charles Wilson, en route to the Sangamon River, about a mile and a half away, was going north. Appellee rode in the rear seat of the Ford car with May Rose Bryant and Harry Adams, and in the front seat with the driver was Miss Bryant's sister, who later became his wife. The driver, Mr. Wilson, and his wife resided in Oklahoma City, Oklahoma, and were not present at the trial; and the only eye witnesses at the time and place of the collision were appellant and appellee and those with her in the rear seat.

It appeared that the driver and Adams had wroked during the forenoon preparing a house to be painted, and on account of ex-

cessive heat had made up the party and were on their way to the river of an outing.

Appellee and her witnesses testified that their car was going fifteen to eighteen or twenty miles an hour, and that appellant came suddenly from a lane on the

left, curved into the direction they were going and collided with their car, breaking the left running board and the radius rod and throwing appellee and others clear of the car and upon the highway. Their car was nearly overturned.

It is the contention of appellant that he drove his car at a low rate of speed, attached his brakes when he came to the end of the lane and was about to drive into the road, and that at that time he looked both north and south for an approaching vehicle and saw nothing. There were some trees in the orchard, near the end of the lane, which partially obstructed appellant's vision. Appellant testified that the Wilson car, when the collision took pace, was on the left hand side of the road and running at a high rate of speed and this testimony is corroborated by other witnesses, and there is testimony that, at this point, the beaten track of the road is to the left and center and that outside of the beaten track the road was rough and not convenient for travel.

The testimony was submitted to a jury, under proper rulings as to evidence. The jury awarded appellee damages in the sum of five hundred dollars, which appear to have been sustained, and judgment was entered on the verdict and appellant brings the case to this court by appeal. If the jury were properly instructed in this case, the verdict and judgment should stand.

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Appellant criticises the first instruction given for appellee. This instruction merely informed the jury that if they believed from the greater weight of the evidence that the defendant negligently operated his automobile, "as charged in the declaration," and that such negligence, if any, was the proximate cause of the injury to the plaintiff, etc., and the instruction properly covered the element of due care on the part of the plaintiff, than the jury should find for the plaintiff. Counsel contends it is reversible error for the court to leave it to the jury to determine what are the material allegations

in the case. That rule prevails when the declaration contains a count defectively stated, and it is not good practice in any case. But in this case the declaration merely charged general negligence, and we do not see but that the instruction complained of contained all of the substantial and necessary allegations material to the issue, set out in the declaration. The jury could not have been misled by this instruction and the giving of it was not reversible error.

Appellant criticises the giving of appellee's second instruction. It is criticised for the same reason as number one, but it contains all of the substantial and material facts in issue and as set out in the declaration. In **Laughlin v. Hopkinson,** 292 Ill. 85, the instruction given and criticised referred to representations set out in the declaration, leaving it to the jury to determine what the representations were and whether or not the statements were material. In the Krieger case, 242 Ill. 544, the error in giving the instruction arose from a defective count in the declaration, in which case the court has held that it was error to

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give the instruction. There was no error in giving either of the instructions cited in this case.

Appellant assigns error that the court refused to give appellant's second instruction asked for. The instruction reads as follows:

"The Court instructs the jury that if you believe from the evidence in this case that the accident occurred on the public highway and that at the time of the accident the defendant was driving an automobile at a rate of speed not greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb of any person using the highway at the place of the injury, then you will find the defendant not guilty of negligence because of the speed

witnesses and their testimony than a court that does not have the witnesses before it.

From a careful reading of the record in this case, this court is not prepared to say that the verdict is clearly or manifestly against the weight and preponderance of the testimony.

The judgment of the Circuit Court of Sangamon County is affirmed.